MAY 1 1950
CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 789

MARGARET DE KORWIN, Individually, and as Executrix of the Estate of Joseph Maria de Korwin, deceased, and JOHN EDWARD SULLIVAN, Special Trustee,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF CHICAGO, a National banking association, individually, and as acting Trustee of the Estate of Otto Young, deceased; GWENDOLYN YOUNG HEYWORTH KOCH; MARIE JULIA YOUNG KAUFMAN PRATT; OTTO YOUNG KAUFMAN; CATHERINE OTTOLIE YOUNG BREWSTER COCHRAN; ANN ELIZABETH YOUNG SAGE; NANCY YOUNG SHAW; WALTER F. WICKES, JR.; CATHERINE YOUNG ALEXANDER; JOHN WILLIAM YOUNG MARTIN; HOWARD MOSES, Guardian Ad Litem; JANE CATHERINE PULITZER, Guardian; DOROTHY DILLEY KAUFMAN, Guardian; and, MICHAEL FAHY, Trustee;

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CHARLES RIVERS AIKEN,
HOMER F. CAREY,
VERNON R. LOUCKS,
77 West Washington Street,
Chicago 2, Illinois,
THOMAS DODD HEALY,
HAROLD STICKLER,
IRVING A. GORDON,
208 South La Salle Street,
Chicago 4, Illinois,
Attorneys for Petitioners.

JOSEPH E. CASEY,
1025 Connecticut Avenue, N. W.,
Washington, D. C.,
Of Counsel.

SUBJECT INDEX.

PAGE

Petition for Certiorari

The opinions below 2

Basis of jurisdiction 2

Matter involved 3

Questions presented 9

Reasons for allowance of certiorari 11

Prayer 20

Brief in Support of Petition for Certiorari

Specification of errors 21

Argument 23

Under Illinois law an Illinois bank is prohibited from effectuating, and in no event is empowered to effectuate, the unification and integration between State and National banks contemplated by the McFadden Act 23

The McFadden Act was never intended to confer powers upon State banks, but only upon National banks. Any other construction would render the McFadden Act unconstitutional 38

The McFadden Act is not to be construed as though a special rule has been created for the construction of State banking statutes which supersedes the State rule of construction of those statutes 48

By imputing to the testator an intent derived solely from statutes enacted after his death, the Court of Appeals failed to follow the Illinois rule of decision and violated the Fifth Amendment 51

Conclusion 55

INDEX TO APPENDIX.

(Under Separate Cover.)

		APP. PAGE
(A)	District Court opinion pertaining to succession by consolidation	1-6
(B)	Court of Appeals opinion pertaining to succession by consolidation	7-14
(C)	Pertinent provisions of the McFadden Act	15-17
(D)	Pertinent provisions of the Illinois Banking Act	18-29
(E)	Excerpts from Bank's brief below pertaining to meaning and validity of the McFadden Act	30-42

TABLE OF CASES AND STATUTES CITED.

Cases.

	PAGE
Alexander v. Bankers Union of Chicago, 187 Ill. App. 469	38
American Loan & Trust Co. v. Minnesota & Northwestern R. Co., 157 Ill. 641	27, 28, 37
Atlantic & Gulf R. R. Co. v. Georgia, 98 U. S. 359	28
Belfield v. Findlay, 389 Ill. 526	52
Boyd v. Strahan, 36 Ill. 355	52
C. & E. I. R. Co. v. Doyle, 256 Ill. 514	25
Calumet, etc. Dock Co. v. Conkling, 273 Ill. 318	26
Carpenter v. Browning, 98 Ill. 282	52
Casey v. Galli, 94 U. S. 673	13, 14, 15, 16, 34, 35, 41
Chicago Title & Trust Co. v. Doyle, 259 Ill. 489	24, 26, 27, 32
Chicago Title & Trust Co. v. Zinser, 264 Ill. 31	24, 26, 27, 51
Com. v. Merchants Nat. Bk. of Allentown, 323 Pa. 145, 185 Atl. 823	15, 39, 47
Continental Ill. Nat. Bank & Trust Co. v. The Peoples Trust & Savings Bank, 366 Ill. 366	13, 26, 37
Davis v. Elmira Savings Bank, 161 U. S. 275	12

Defoe v. Board of Public Instruction, 132 F. 2d. 971.. 29
DeKorwin v. First Nat. Bank, 84 F. Supp. 918 .....2, 29
DeKorwin v. First Nat. Bank. 179 F. 2d 347..... 2
Diversey v. Smith, 103 Ill. 378 .....26, 32
Drovers & Mech. Nat. Bank v. First Nat. Bank, 260 Fed. 9 26
ExParte Worcester County Nat. Bank, 279 U. S. 347 .....13, 15, 16, 18, 41, 44
Farley v. Albers, 112 F. 2d. 401 50
First National Bank v. Fellows, ex rel. Union Trust Co., 244 U. S. 416 .....19, 40, 50
First Nat. Bank v. Harry E. Chapman Co., 160 Tenn. 72 15
First National Bank v. Lindberg, 293 Ill. App. 474 33
Fridley v. Brown, 87 Ill. 151 .....26, 32
Fulton v. Lloyds Gas Co., 75 F. 2d 295 47
Granzow v. Village of Lyons, Ill., 89 F. 2d. 83 .....37, 50
Gray v. First Nat. Bk., 294 Ill. App. 62 34
Head & Amory v. The Providence Insurance Co., 6 U. S. (2 Cranch) 127 25
Hofheimer v. Seaboard Cit. Nat. Bk. of Norfolk, 154 Va. 392, 153 S.E. 656 .....15, 31
Hopkins Fed. Saving & Loan Assn. v. Cleary, 296 U. S. 315 .....14, 15, 36, 41, 46
In Re Estate of Busby, 288 Ill. App. 500 .....6, 29
In Re Watkins Estate, 113 Vt. 126 15
Joseph v. Village of Downers Grove, 104 F. 2d. 974..37, 50
Kavanagh v. Omaha Life Assn., 84 Fed. 295 28
Keokuk & W. R. Co. v. Missouri, 152 U. S. 301 28
Knass v. Madison & Kedzie Bank, 354 Ill. 554 .....32, 37
Knights of Pythias v. Meyer, 265 U. S. 30 .....18, 19, 49
LaParr v. City of Rockford Illinois, 100 F. 2d. 564 ..37, 50
Leffingwell v. Warren, 67 U. S. (2 Black) 599 .....18, 49
Louisville & Nashville Rd. v. Kentucky, 161 U. S. 677 .....33, 39, 48
Marion v. Sneeden, 291 U. S. 262 .....37, 50

McNulta v. Corn Belt Bank, 164 Ill. 427 .....26, 32
McRoberts v. Minier, 70 Ill. App. 1 .....26, 27, 33, 39, 51
Metropolitan Bank v. Godfrey, 23 Ill. 531 26
Nat. Home Bldg. & Loan Assn. v. Home Sav. Bank, 181 Ill. 35 .....25, 26
Orr v. Yates, 209 Ill. 222 52
Penn v. Fogler, 182 Ill. 76 44
People v. Brady, 271 Ill. 100 .....44, 51, 55
People v. Hinrichsen, 161 Ill. 223 32
People v. Wiersema State Bank, 361 Ill. 75 .....12, 37
Rural Agr. School Dist. No. 1 v. Guardian Nat. Bank, 6 F. Supp. 482 26
Smith v. Garber, 286 Ill. 67 52
Sneeden v. City of Marion, Ill., 64 F. 2d 721 .....13, 37, 50
State v. First Nat. Bank, 57 N. Dak. 574 15
State Bank of Blue Island v. Benzing, 383 Ill. 40 .....26, 29, 33, 37
State Ex Rel. Cleary v. Hopkins St. B. & L. Asso. 217 Wis. 179, 257 N.W. 684 .....15, 45
Texas & P. R. Co. v. Pottorff, 291 U. S. 245 39
The Metropolitan Bank v. Godfrey, 23 Ill. 531 32
Village of Glencoe v. Hurford, 317 Ill. 203 32
Western & Atl. R. Co. v. Henderson, 279 U. S. 639 ....19, 54
Worcester County Nat. Bank, Pet., 263 Mass. 444, 162 N.E. 217 .....13, 29, 44

STATUTES.

Federal Reserve Act (38 Stat. at L. 262, U.S.C., T. 12, sec. 248(b)) 51
Illinois Banking Act. (Ill. Rev. Stat., 1949, State Bar Assn. Ed., Vol. 1, Ch. 16½, secs. 12, 13, 2, 3, 4, 5, 8) (Set out in Appendix "D," pp. 18-29) 26, 30
McFadden Act (44 Stat. 1225, 48 Stat. 190, U.S.C., T. 12, sec. 34(a)) (44 Stat. 1224, U.S.C., T. 12, sec. 34(a)), (44 Stat. 186, 190, U.S.C., T. 12, sec. 34(a)) (Set out in Appendix "C," pp. 15-17..2, 3, 4, 9, 51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos.

MARGARET DE KORWIN, Individually, and as Executrix of the Estate of Joseph Maria de Korwin, deceased, and JOHN EDWARD SULLIVAN, Special Trustee,

Petitioners,

VS.

THE FIRST NATIONAL BANK OF CHICAGO, a National banking association, individually, and as acting Trustee of the Estate of Otto Young, deceased; GWENDOLYN YOUNG HEYWORTH KOCH; MARIE JULIA YOUNG KAUFMAN PRATT; OTTO YOUNG KAUFMAN; CATHERINE OTTOLIE YOUNG BREWSTER COCHRAN; ANN ELIZABETH YOUNG SAGE; NANCY YOUNG SHAW; WALTER F. WICKES, JR.; CATHERINE YOUNG ALEXANDER; JOHN WILLIAM YOUNG MARTIN; HOWARD MOSES, Guardian Ad Litem; JANE CATHERINE PULITZER, Guardian; DOROTHY DILLEY KAUFMAN, Guardian; and, MICHAEL FAHY, Trustee;

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

I.

PETITION FOR CERTIORARI.

Your petitioners, Margaret de Korwin, individually, and as executrix of the estate of Joseph Maria de Korwin, deceased, substituted plaintiff below, and John Edward Sullivan, appointed special trustee *pendente lite* by the District Court, pray for a review on certiorari of that part of the decision in this cause by the Court of Appeals for the Seventh Circuit which partially reverses a decree of the District Court, and in support hereof respectfully show:

(A)

The Opinions Below.

The opinion of the District Court (R. 399-429) is reported in 84 F. Supp. 918. The opinion by the Court of Appeals (R. 484-496) is reported in 179 F. 2d 347.

The portion of each opinion pertinent to this petition is for convenience set out in the Appendix submitted herewith ("A", "B", pp. 1-6, pp. 7-14).

(B)

Basis of Jurisdiction.

Jurisdiction to review the decision below is invoked under U. S. C., Title 28, sec. 1254, par. 1 (62 Stat. 928).

The judgment to be reviewed was rendered by the Court of Appeals for the Seventh Circuit on December 30, 1949, and timely petitions for rehearing were denied February 1, 1950. The petition in conformity with Rule 38 of this Court is presented within the time limited by U. S. C., Title 28, sec. 2101 (c) (62 Stat. 962).

(C)

Matter Involved.

The matter involved is the meaning and validity of the so-called consolidation provisions of the McFadden Act (44 Stat. 1225, 48 Stat. 190, U. S. C., T. 12, sec. 34 (a)).*

In a suit by petitioner De Korwin against the respondent Bank and others for a declaratory judgment and for the appointment of a successor trustee and an accounting, the District Court held the Bank without authority to administer the trust and ordered it to account as a trustee *de son tort*. 84 F. Supp. 918. The Court of Appeals ruled that the Bank had been invested with the trusteeship by the terms and provisions of the McFadden Act and set aside the findings of vacancy in the trust and the *de son tort* liability of the Bank. In all other respects, the District Court decree was affirmed. 179 F. 2d. 347.**

Three identical judgments were entered by the Court of Appeals due to the prosecution of separate appeals (R. 497-499), and, therefore, the issuance of three writs of certiorari is asked to review that part of the decision which reverses the District Court decree.

This litigation involves the testamentary trust estate of Otto Young, a pioneer Chicago merchant, who died in 1906. The trust properties comprise a number of buildings in the heart of Chicago's business district and are estimated to be worth from thirty-five to eighty million dollars. It is reputedly the fifth largest private trust in this country (R. 399).

---

* The so-called consolidation provisions of the McFadden Act, Sec. 34(a), as they appeared in 1933 during the time in question, are set out in their entirety in the accompanying Appendix (pp. 15-17).

** On a prior appeal the Federal jurisdiction was sustained. 156 F. 2d 853; cert. den. 329 U. S. 795.

Without authority under the will of Otto Young and lacking power under Illinois law, the respondent First National Bank of Chicago in 1933 took over the trusteeship of Otto Young's vast estate. It seized these trust assets solely upon the basis of the so-called consolidation provisions of the McFadden Act (44 Stat. 1225, 48 Stat. 190, U. S. C., T. 12, sec. 34(a)), which had been enacted many years after the testator's death. With the leverage of these provisions of the McFadden Act, and in contravention of Illinois law, the First National Bank had absorbed into the National banking system, under its Federal charter, a State bank and its fiduciaryships—a State bank which itself was administering Otto Young's trust without authority under the will.

Thus this Court is here concerned with whether the Congress intended, by the so-called consolidation provisions of the McFadden Act, to create an instrument of Federal power by which an Illinois bank and its fiduciaryships may without claim or pretense of authority under Illinois law be recruited into and absorbed by the National banking system under the Federal charter of the First National Bank and under paramount Federal control; and, whether such provisions were intended to override, as well, the contrary testamentary intent of the testator as reflected by his will which had become effective many years before passage of the McFadden Act.

When Otto Young died, in 1906, he named the First Trust and Savings Bank of Chicago, an Illinois corporation, as the sole trustee of his testamentary trust (R. 151). The will further provided (R. 157):

> "In the event that said trustee shall refuse to qualify or act, or further act as trustee under this will, for any cause, a successor in trust, or a new trustee, may be appointed by any court of competent jurisdiction, by and with the approval in writing of the appointee

> by not less than one-half (1/2) in number of my wife and children then living, and such new trustee so appointed shall have all the powers hereinbefore given to the original trustee named herein."

On February 11, 1929, the First Union Trust and Savings Bank, a new Illinois banking corporation, assumed administration of the Otto Young trust without judicial appointment (R. 403), despite the successorship provisions of the will so requiring, as above quoted. The First Union had been created as the result of a consolidation between the First Trust and the Union Trust Company, another State bank, pursuant to the Illinois Banking Act (R. 403). After administering the Otto Young trust for some four years, the First Union, on July 17, 1933, in contravention of Illinois law and solely under the consolidation provisions of the McFadden Act, merged into and was wholly absorbed by the First National Bank of Chicago, a preexisting National banking association, under the Federal charter of the First National (R. 403). Thereupon, without any judicial appointment the First National took over Otto Young's trusteeship and has been administering the trust without such authority until the present time (403), despite the requirements of the successorship provisions in the will (R. 403).

Neither the First Union nor the First National has at any time made a formal accounting of its administration of the Otto Young trust estate. The only judicial accounting ever given of this huge fund was made by the First Trust and that covered merely the period from the beginning of the trust to March 26, 1916 (R. 402). Since the First Trust failed to account for its stewardship of the trust from 1916 to 1929, it is apparent, in the words of the District Court, that (R. 427):

> "Thirty-three years of trust administration by three separate banks have passed since the last accounting."

The result of these developments is that during a thirty-three year period, encompassing two world wars, and including the inflation of the twenties, the great depression of the early thirties, and the war boom and inflation of the last decade, Otto Young's trust property, worth tens of millions of dollars, has passed from hand to corporate hand, without a formal accounting, and without judicial appointment, as contemplated by the will. The consequent hazards to the beneficiaries of this trust are manifest, especially when it is remembered that during part of that thirty-three year period here involved the First Union, whose trust department the First National acquired by merger, was exposed by high judicial authority in Illinois, in the case of *In Re Estate of Busby,* 288 Ill. App., 1937, 500, 525, 530, as being a bank which "disregarded the elementary and fundamental principles of executorship", and which was managed by a chief executive officer who was "not only imprudent and negligent but positively reckless" in dealing with the property of a widow and minor children.

The original plaintiff, Joseph de Korwin, having a beneficial interest in the trust estate through inheritance from his son, Stanley, a grandchild of Otto Young, made a written demand in 1943 upon the First National Bank for an accounting (R. 403, 427), which was refused (R. 403). Thereupon, the present suit was brought in which it was sought to have the so-called consolidation provisions of the McFadden Act construed and a ruling made as to their application in this case; to have the will construed so as to declare the beneficial interest of the plaintiff and all others similarly situated, and so as to declare that the First Na-

tional, and the First Union before it, acted without authority; and, to have the trust declared vacant, a successor trustee judicially appointed, and the First National made to account for the administration of itself and its predecessors, whose liabilities it had assumed (R. 147-149).

The First National not only resisted an accounting, in equity and good conscience long overdue, but also interjected itself into the strenuously litigated controversy among beneficiaries as to the interest in the trust of plaintiff and others similarly situated, a matter which could have had no effect upon the Bank's status as trustee nor upon its administration of the trust (R. 404, 406, 409).

While the suit was pending for trial, plaintiff died testate leaving all of his property to his widow, who became the substituted plaintiff, individually, and as executrix of his estate (R. 400).

The District Court declared that the plaintiff had a beneficial interest and was entitled to an accounting (R. 427), and this part of the holding was affirmed by the Court of Appeals (R. 495). With respect to the status of the First Union and the First National, the District Court held that these banks had no authority under Otto Young's will to act as trustee without having first secured judicial appointment. Since neither bank had been appointed by a court and inasmuch as the originally named trustee, the First Trust, had passed out of existence in 1929, a vacancy was created under the will which had never been filled pursuant to the testamentary provisions (R. 423). Basing its decision upon a construction of the successorship provisions in the will, and determining in substance that the First Union had no trusteeship to transfer to the First National as part of the 1933 merger, the District Court failed to reach questions as to the validity and

consequences of the merger of 1933 under the McFadden Act, and, therefore, had no occasion to construe the Act (Appendix, pp. 1-6).

The Court of Appeals reversed with respect to the banks' status as trustee (Appendix, p. 14), holding as to the 1929 transaction that under the Illinois rule of decision a unification by consolidation or merger does not of itself operate to create a vacancy in the trusteeship (R. 492), and that the successorship provisions of Otto Young's will are to be construed as not creating a vacancy in the trusteeship in the event of a valid consolidation or merger by the trustee (R. 493). The court held with respect to the 1933 unification that the so-called consolidation provisions of the McFadden Act were a source of authority for the First Union to merge with the First National and to transfer the trusteeship, and that such merger was not in contravention of Illinois law because Illinois had no statute which, in so many words, expressly prohibited the merger (R. 494). Finally, the court decided that although the testator, at the time of the execution of his will, and at the time of his death, could not lawfully have appointed the First National as trustee of his testamentary trust, nevertheless, by virtue of certain provisions of the Federal Reserve Act and by reason of the so-called consolidation provisions of the McFadden Act, both enacted many years after the testator's death, the testator must be charged under Illinois law with the artificial intent of having appointed the First National as his successor trustee (R. 495).*

Thus it is seen that the decision by the Court of Appeals with reference to the status of the First National Bank as trustee depends vitally upon a construction of

* That part of the Court of Appeals opinion which treats the consolidation issue and rests the right of the First National Bank to act as trustee on the McFadden Act is set out in full for convenient reference in the accompanying Appendix (pp. 7-14).

the so-called consolidation provisions of the McFadden Act, which, with the other matters involved, are set out and brought into clear focus in the form of questions presented by this petition.

(D)

Questions Presented.

The following widely important questions are presented by this petition:

(1) Are the so-called consolidation provisions of the McFadden Act, as amended in 1933 (44 Stat. 1225, 48 Stat. 190, U. S. C., T. 12, sec. 34 (a)), to be construed as conferring powers of unification and integration upon State banks as well as upon National banks? In the absence of a grant of matching or corresponding power under the State law for State banks to unify and integrate with National banks, are these provisions of the McFadden Act to be construed as furnishing the authority for a State bank to do so? If so, has not Congress thereby trespassed upon a domain of activity reserved to the States under the Tenth Amendment? Are the constitutional powers of the Federal government enlarged in this regard solely in consequence of a failure by the State to grant such power to the banks of that State?

(2) Is the provision of the McFadden Act (44 Stat. 1225, U. S. C., T. 12, sec. 34 (a)) that "no such consolidation shall be in contravention of the law of the State . . ." to be construed as if a special rule has been thereby created for the construction of State banking statutes,—a special rule designed to supersede the State rule for the construction of its banking statutes?

(3) In applying the provisions of the McFadden Act (44 Stat. 1225, 48 Stat. 190, U. S. C., T. 12, sec. 34 (a)) that

no unification between a State bank and a National banking association shall occur "in contravention of the law of the State", does not the State law control in determining whether the type of unification contemplated by such provisions is that type of unification which State-created banks are empowered to enter into?

(4) Does a State rule of decision violate the due process clause of the Fourteenth Amendment if it makes Federal statutes enacted after the testator's death a basis for imputing to him an artificial intent to accomplish that which was prohibited by law when his will was executed and at the time of his death? If so, did the Court of Appeals violate the Fifth Amendment in applying such a purported State rule of decision?

Should the writ of certiorari issue in this case, petitioners will also present the following questions:

(a) What was the Illinois law concerning the question whether, on July 17, 1933, the First Union Trust and Savings Bank, an Illinois banking corporation, had power to unite and become integrated with the First National Bank of Chicago, a National banking association? Did the Court of Appeals follow such Illinois law?

(b) What was the Illinois law concerning the question as to the capacity and right of the First National Bank of Chicago to act as successor trustee under the testamentary trust of Otto Young following the purported unification and integration of that bank with the First Union Trust and Savings Bank? Did the Court of Appeals follow such Illinois law?

(c) Did the Court of Appeals correctly construe the provisions in the will of Otto Young relative to the appointment of a successor trustee when determining whether the First Union Trust and Savings Bank, from 1929 to

1933, and the First National Bank of Chicago, from 1933 to date, were authorized to act as successor trustees of his testamentary trust?

(E)

Reasons for Allowance of Certiorari.

Three principal reasons why this Court should grant certiorari in this case, pursuant to Rule 38, par. 5 (b), are that the Court of Appeals decided: (1) important questions of Federal law which have not been, but should be, settled by this Court; (2) Federal questions in ways probably in conflict with applicable decisions of this Court; and (3) important questions of local law in ways probably in conflict with local decisions.

(1)

The decision by the Court of Appeals in the instant case with reference to the status of the First National Bank as trustee rests in part, if not entirely, upon the premise that the so-called consolidation provisions of the McFadden Act should be construed as a manifestation of Congressional intent to confer powers of unification and integration, not only upon National banks, but also upon State banks—so that, as in the instant case, when the State law does not grant a matching or corresponding power to State banks to unify and integrate with National banks, such provisions of the McFadden Act are to be construed as giving that power to a State bank.

Petitioners contend that said provisions of the McFadden Act were never intended to confer powers upon State banks, but were meant to confer powers only upon National banks (see *post,* pp. 38-41)—*a matter upon which this Court has never passed.*

In determining how the so-called consolidation provisions of the McFadden Act are to be construed, it is necessary to consider whether it would be in contravention of the Tenth Amendment for Congress to attempt to endow State banks with the power to unite and become integrated with National banks when the State has not granted such power to State banks. Under these provisions of the McFadden Act the nature and extent of the State bank's unification and integration with the National bank is such that the State banking corporation abandons its name, transfers to the National bank all of its "rights, franchises and interests . . . in and to every species of property, real, personal and mixed, and choses in action thereto belonging", as well as "all rights of property, franchises and interests" held as a fiduciary; and, by continuing its existence under the Federal charter, the State bank subjects itself to the Federal government as the prime and paramount regulatory authority over its existence and affairs. By abandoning its name, transferring its property and fiduciaryships and by ceasing business and all of its functions as a State bank, the State bank has dematerialized itself into an anonymous and amorphous component of a National banking association under the supervening jurisdiction of the Federal government. *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 283.

The State has a vital interest in the existence, continued operation and strict regulation of State banking institutions in accordance with State public policy as expressed in its laws. Traditionally, the banking business has been viewed as so peculiarly impressed with a public interest that banks have come to be regarded as quasi-public institutions. The strict regulation of State banks is a matter of concern not only to the stockholders and depositors but to the public at large. *People* v. *Wiersema State Bank,* 361

Ill. 75, 87; *Continental Ill. Nat. Bank & Trust Co.* v. *The Peoples Trust & Sav. Bank,* 366 Ill. 366, 374; *Sneeden* v. *City of Marion, Ill.* (C. A. 7), 64 F. 2d 721, 726. Thus, while it may be assumed that Congress can exercise complete control over National banks as its own corporate creatures, a serious constitutional question arises when Congress seeks to place State banking institutions under Federal charter and jurisdiction and thereby absorb for the benefit of a National bank all property and functions of the State bank wholly without claim or pretense of State authority to do so. *This question has never been decided by this Court.*

The opinion by the Court of Appeals cites no Federal authority in support of its ruling that provisions of the McFadden Act confer powers of unification and integration upon State banks. However, as appears from the arguments of respondent Bank to the Court of Appeals (Appendix, pp. 30-42), the impression that the McFadden Act was intended to confer powers of unification and integration upon State banks as well as National banks, and that it was constitutional for Congress to do so, originates in the decision of the Supreme Judicial Court of Massachusetts in the case of *Worcester County Nat. Bank, Pet.,* 263 Mass. 444, 162 N. E. 217, and the decision of this Court affirming that judgment (*Ex Parte Worcester County Nat. Bank,* 279 U. S. 347).

In the course of its reasoning on whether the consolidation under consideration in the *Worcester Bank* case would contravene Massachusetts law, the Massachusetts court erroneously interpreted *Casey* v. *Galli,* 94 U. S. 673, as reaching a constitutional question, and as a holding that it was constitutional for Congress to empower State banks to transmute themselves into National banks whether or not in contravention of State law, and therefore, as being, *a fortiorari,* authority for the constitutionality of

those provisions of the McFadden Act purporting to authorize State trust companies to consolidate with National banks (162 N. E., at p. 220).

Upon appeal, this Court summarized the reasoning of the Massachusetts court in that regard, including the State Court's erroneous interpretation of *Casey* v. *Galli*, 94 U. S. 673. But since the parties did not pose the question whether the consolidation was valid (*post*, pp. 44-46), this Court perforce accepted the rule of decision of the Massachusetts court, that the consolidation under the McFadden Act did not contravene Massachusetts law, and inasmuch as it was unquestioned and unquestionable that the McFadden Act enabled the National bank to enter into the consolidation, this Court agreed with the conclusion of the Massachusetts court that the consolidation there under consideration was lawful (279 U. S., at p. 360; see discussion, *post*, pp. 44-46).

From the fact that this Court agreed with the conclusion of the Massachusetts court and summarized the reasoning of that court with respect to the legality of the consolidation, including its misconception of *Casey* v. *Galli* as being an authority upon a constitutional question, the misimpression has arisen that this Court's decision in *Ex Parte Worcester County Nat. Bank*, 279 U. S. 347, is a holding that it is constitutional for Congress to authorize State banks, without sanction of State law, to consolidate with National banks.

That the Massachusetts court was wrong in believing *Casey* v. *Galli* to be an authority on a constitutional question is shown by *Hopkins Fed. Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315, 341-343, where this Court said (p. 342):

> "No question of constitutional power was in the (*Casey* v. *Galli*) case."

The reasoning of the Massachusetts court clearly was based upon a faulty premise. And since the parties on appeal did not present any questions as to the validity of the consolidation, this Court's agreement with the conclusion of the Massachusetts court in that regard and this Court's summarization of the reasoning by the State court in that connection did not amount to a holding that the McFadden Act is to be construed as conferring powers of unification and integration upon State banking corporations, nor to a holding that, so construed, the McFadden Act was constitutional.

Many State courts, in addition to the Massachusetts court, have misinterpreted the scope and authoritative value of this Court's decisions in *Casey* v. *Galli*, 94 U. S. 673, or *Ex Parte Worcester County Nat. Bank*, 279 U. S. 347, or both. See, for example, *Hofheimer* v. *Seaboard Cit. Nat. Bk. of Norfolk*, 154 Va. 392, 153 S. E. 656, 657-658; *First Nat. Bank* v. *Harry E. Chapman Co.*, 160 Tenn. 72, 22 S. W. 2d 245, at pp. 245-246; *State* v. *First National Bank*, 57 N. Dak. 574, 579, 224 N. W. 161, 162; *In Re Watkins Estate*, 113 Vt. 126, 132, 30 A. 2d 305, 309 (decided after the *Hopkins Fed. Sav. & Loan Assn.* case). On the other hand, the Wisconsin Supreme Court, in *State ex rel. Cleary* v. *Hopkins St. B. & L. Assn.*, 217 Wis. 179, 175, 257 N. W. 684, 690 (affirmed *Hopkins Fed. Sav. & Loan Assn.* v. *Cleary*, 296 U. S. 315) recognized the case of *Ex Parte Worcester County Nat. Bank* as having limited authority.

See, also, *Com.* v. *Merchants Nat. Bk. of Allentown*, 323 Pa. 145, 185 Atl. 823, 825-826, where the Pennsylvania Supreme Court stated that under the doctrine of *Hopkins Fed. Sav. & Loan Assn.* v. *Cleary* it would be a violation of the Tenth Amendment for Congress to attempt to grant

to a Pennsylvania trust company authority to consolidate with a National bank when not sanctioned by State law.*

From the foregoing, it becomes plain that the questions here presented are of far reaching importance to the Congress, to the several State legislatures, to the Bench and Bar of Federal and State courts, and to the banking profession generally. Until this Court shall pass upon these questions, Congress will likely be misled as to the scope of its constitutional powers in the banking field and concerning the extent to which its intent has been reflected by the McFadden Act. State legislatures will be without guidance as to whether their existing statutes are effective to carry out State policy in preserving intact their State banking institutions. Federal and State courts may very well reach divergent results in this area, depending upon their respective views as to the meaning of *Casey* v. *Galli* and *Ex Parte Worcester County Nat. Bank*, in the light of the language of *Hopkins Fed. Savings & Loan Assn.* v. *Cleary*. The obvious effect of uncertainty in this field upon banking institutions requires no elaboration.

(2)

All three of the foregoing reasons for granting certiorari apply to the following questions presented by this petition:

(1) Is the provision of the McFadden Act (44 Stat. 1225, U. S. C., T. 12, sec. 34 (a)), which reads, "No such consolidation shall be in contravention of the law of the State", to be construed as though a special rule has been created for the construction of State banking statutes, which special rule supersedes the State rule of construction of those statutes?

(2) In view of the provision of the McFadden Act that no unification between a State bank and a National banking association shall occur "in contravention

* In *Hopkins* v. *Cleary*, 296 U. S. 315, the Court by Cardozo, J., referred (p. 334n) to "Complementary Statutes" in many States in apparent recognition of the constitutional need for State enabling legislation.

of the law of the State", does the State law control in deciding whether the type of unification contemplated by the McFadden Act is the type of unification which State-created banks are empowered to enter into?

The Illinois Banking Act, in so many words, neither empowers nor prohibits unifications and integrations between Illinois banks and National banks, except that it authorizes a sale of assets by an Illinois bank to a National bank which assumes the former's liabilities (*post*, pp. 26-33). In no event do the Illinois statutes empower a State bank to enter into the type of unification contemplated by the McFadden Act, which, under Illinois law, would be regarded as a merger (see pp. 23-28, *post*). Under the fixed and received rule of construction applied by the Illinois Supreme Court to the Illinois Banking Act, failure to grant particular powers is deemed to be an express prohibition of the exercise of those powers (*post*, pp. 24-29; 32-33; 36-38).

The McFadden Act provides that such unification and integration shall not occur "in contravention of the law of the State". In view of the Illinois rule of construction, just noticed, it is manifest that the purported unification and integration, on July 17, 1933, of the First Union Trust and Savings Bank, an Illinois banking corporation, and the First National Bank of Chicago, a National banking association, was illegal under Illinois law, because it was not a sale and assumption agreement (*post*, pp. 26-33). Yet, the Court of Appeals in the case at bar upheld such unification and integration (R. 495), *thereby failing to follow local law.*

The decision by the Court of Appeals appears to be premised in part, if not entirely, upon the supposition that the provisions of the McFadden Act created a special statutory rule for construing the Illinois Banking Act—

as if the words "in contravention of the law of the State" were to be read "in contravention of the *statutes* of the State, *divorced and isolated from the rules of construction applied to those statutes by the Supreme judicial authority of the State.*" Thus, the decision below necessarily raises the question: Did Congress intend to create a special statutory rule of construction for State statutes? *This question has never been decided by this Court.*

Construing the McFadden Act as though State rules of construction are to be disregarded has the effect of frustrating the Congressional intent, under the McFadden Act, to make the State law predominate (*Ex Parte Worcester County Nat. Bk.*, 279 U. S. 347, 359-360), as a means of protecting the vital interests of the State in its corporate creatures, particularly its banking institutions (*ante*, p. 12; *post*, pp. 40-44). This construction of such provisions of the McFadden Act, if sanctioned and extended to other sections of the National Bank Act and to other Acts having similar language, might become a major device for defeating the intent of Congress to obtain harmony and bring about the concordant exercise of National and State power in the fields with which those statutes are concerned.

The decision appears to be in conflict with deeply imbedded doctrines long and well established by the decisions of this Court. It is axiomatic that statutes of a State are to be construed in accordance with the settled rules of construction of the supreme judicial authority in that State, and that such construction so made becomes a part of the statute as though physically incorporated into its text. *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32; *Leffingwell* v. *Warren*, 67 U. S. (2 Black) 599, 603. The *Knights of Pythias* case is direct authority for the proposition that where the exercise of corporate power under a Federal statute is made to depend upon whether it would "conflict with the laws . . . of the State", the quoted words are deemed to

refer not to the State statutes denuded of State judicial construction, but, rather, to the State statutes as construed in accordance with the rules of construction applied by the highest court of that State. Since the word "conflict", as used in the statute under consideration in the *Knights of Pythias* case, is synonymous with the word "contravention", as used in the McFadden Act, it appears that the ruling in the *Knights of Pythias* case should have been, but was not, followed by the Court of Appeals in the instant case.

The decision in the case at bar also appears to be in conflict with this Court's decision in *First National Bank* v. *Fellows ex rel. Union Trust Co.*, 244 U. S. 416, 426-428, which construed the words "when not in contravention of State or local law", as contained in Section 11(k) of the Federal Reserve Act (38 Stat. at L. 262, U. S. C., T. 12, Sec. 248(k)), as authorizing the Federal Reserve Board to grant National banks power to act as fiduciaries *when the State law, as construed in accordance with State rules of construction, granted such powers to State banks.*

(3)

In holding that, under a supposed State rule of decision, a statute enacted after the testator's death is to be made a basis for imputing to the testator an artificial intent to do that which was unlawful at the time the will was executed and at the time of his death, *the Court of Appeals determined an important Federal constitutional question which this Court has not decided but should decide* (R. 495; App. 14). The Court of Appeals holding on this point is probably in conflict with the doctrine underlying *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 643-644. (See *post*, pp. 54-55).

Actually, the State rule of decision is not as represented by the Court of Appeals see pp. 52-54, *post*). If it were,

it would violate the Fourteenth Amendment (see *post*, pp. 54-55), and by applying a rule in violation of the Fourteenth Amendment the Court of Appeals *ipso facto* violated the Fifth Amendment.

A multitude of cases arising in connection with conveyances are likely to be affected by this erroneous doctrine. Not only would this rule be a matter of grave concern to testators, but also to trustors, grantors, assignors and other conveyancers who have made irrevocable transfers of property.

(F)

Prayer.

Wherefore, petitioners pray for the issuance of writs of certiorari to the Court of Appeals for the Seventh Circuit to review that part of its decision in the instant case partially reversing the decree of the District Court.

Respectfully submitted,

CHARLES RIVERS AIKEN,
HOMER F. CAREY,
VERNON R. LOUCKS,
Attorneys for Petitioner Margaret DeKorwin, Individually and as Executrix, etc., substituted Plaintiff below.

THOMAS DODD HEALY,
HAROLD STICKLER,
IRVING A. GORDON,
Attorneys for petitioner John E. Sullivan, Special Trustee Pendente Lite, etc.

JOSEPH E. CASEY,
Of Counsel.

II.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

(A)

Specification of Errors

Should writs of certiorari be issued, petitioners intend to urge that the Court of Appeals for the Seventh Circuit erred:

1. In construing the so-called consolidation provisions of the McFadden Act to be a manifestation of Congressional intent to confer powers of unification and integration not only upon National banks, but also upon State banks; in construing said provisions of the McFadden Act as providing power to a State bank to enter into a unification and integration with a National bank in the absence of the grant of a matching or corresponding power under State law for a State bank to do so; in holding, in effect, that said provisions of the McFadden Act, so construed, did not violate the Tenth Amendment, and that the constitutional powers of the Federal government are enlarged in the respects, aforesaid, merely by virtue of the failure of the State to grant such power to State banks;

(2) In construing the provision in the McFadden Act, "No such consolidation shall be in contravention of the law of the State", as if a special rule has been created for the construction of State banking statutes which supersedes the State rule of construction of said statutes;

(3) In holding, in effect, that the State law does not control in determining whether the type of unification and integration contemplated by the so-called consolidation

provisions of the McFadden Act is the type of unification which State banks are empowered to enter into;

(4) In holding that under a purported Illinois rule of decision Federal statutes enacted after the testator's death are to be made the basis for imputing to the testator an artificial intent to accomplish that which was prohibited by law when his will was executed and at the time of his death; in holding, in effect, that such a purported State rule of decision did not violate the due process clause of the Fourteenth Amendment; and, in failing to hold that to apply such a purported State rule of decision would violate the Fifth Amendment;

(5) In failing to hold that on July 17, 1933, the First Union Trust and Savings Bank, an Illinois banking corporation, had no power under Illinois law to unite and become integrated with the First National Bank of Chicago, a National banking association;

(6) In failing to hold that, under the Illinois law, the First National Bank of Chicago had no capacity or right to act as successor trustee under the testamentary trust of Otto Young following its unification and integration with the First Union Trust and Savings Bank;

(7) In construing the provisions of the will of Otto Young relating to the appointment of a successor trustee in such a manner as to hold that under Illinois law the First Union Trust and Savings Bank, from 1929 to 1933, and the First National Bank of Chicago, from 1933 to date, were duly authorized to act as successor trustees of Otto Young's testamentary trust; and

(8) In failing to follow the Illinois law with reference to the matters set forth in the preceding paragraphs numbered 4, 5, 6 and 7.

(B)

Argument.

MAY IT PLEASE THE COURT:

(1)

Under Illinois law, an Illinois bank is prohibited from effectuating, and in no event is empowered to effectuate, the unification and integration between State and National banks contemplated by the McFadden Act of 1927, as amended in 1933.

The McFadden Act, insofar as material, provided:

> "Any bank incorporated under the laws of any State . . . may be consolidated with a National banking association located in the same . . . city . . . under the charter of such National banking association. . . . Upon such a consolidation, . . . the corporate existence of the constituent banks and National banking associations participating in such consolidation shall be merged into and continued in the consolidated National banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights, franchises, and interest of each of such constituent banks and National banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated National banking association without any deed or other transfer; and such consolidated National banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian

> of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation. . . . No such consolidation shall be in contravention of the law of the State under which such bank is incorporated." (44 Stat. 1225, 48 Stat. 190, U.S.C., T. 12, Sec. 34(a)).

It seems clear, from the express language of the McFadden Act, that the type of unification and integration contemplated is one where the State bank abandons its name, transfers all its property and fiduciaryships to the National bank, ceases business and all functions as a State bank, and continues existence in a dematerialized condition under the charter of the National bank which has absorbed it.

This type of unification and integration, though styled in the McFadden Act a consolidation, is identical with, or most closely resembles, a merger as defined by Illinois law.

There is a fundamental difference between consolidations and mergers under Illinois law. They are two distinct statutory methods of unifying corporations. In the case of consolidation, the uniting corporations are dissolved and pass out of existence in favor of a new corporation which supersedes them. In the case of a merger, one of the uniting corporations survives and absorbs the other. *Chicago Title & Trust Co.* v. *Doyle,* 259 Ill. 489, 493; *Chicago Title & Trust Co.* v. *Zinser,* 264 Ill. 31, 33-35.

There can be neither consolidation nor merger without statutory authority. As stated in the *Doyle* case (259 Ill. 489, 492):

> "Corporations are creations of the General Assembly, which grants to them such privileges and endows them with such powers as are deemed for the

public good. As a corporation must be created originally by statutory authority, any consolidation, purchase or merger by which it acquires the franchises of another corporation must also have statutory authority."

The Illinois Supreme Court's statement in the *Doyle* case is a mere reiteration of the general doctrine prevailing in this country from earliest jurisprudence. *Head & Amory* v. *The Providence Insurance Co.*, 6 U.S. (2 Cranch) 127, 167. Generally, see *Nat. Home Bldg. & Loan Assn.* v. *Home Sav. Bank*, 181 Ill. 35, 40.

Authority to consolidate is not the same as authority to merge. In this connection, the *Doyle* case held (259 Ill., pp. 495-496):

> "The consolidation in the case of *Scheidel Coil Co.* v. *Rose*, supra, was effected under the act in force March 26, 1873, as amended in 1887 and again in 1889 (Laws of 1889, p. 95) which simply provides for the consolidation of corporations. Neither in the title nor body of the act is there anything which would take a consolidation under it out of the ordinary and general rule that the constituent corporations cease to exist and a new one is created. That statute contains no authority for the merger of one corporation into another or for the purchase of the property, stock or franchises of one corporation by another, and it was held that a new corporation was created. The consolidation in this case was under the same act and necessarily our conclusion must be the same."*

---

* Respondent bank, attempting to minimize the importance attached to the use by an Illinois statute of the word "consolidation", rather than the word "merger", as an authorized mode or manner of effecting a corporate unification, directed the attention of the Court of Appeals to certain language in the case of *C. & E. I. R. Co.* v. *Doyle*, 256 Ill. 514, 522 (R. 607). A casual reading of that language, taken out of context, might create an impression that the Illinois court regards the use of either term in a given statute as authorizing unification in both modes or manners, and that the difference in statutory language is of little importance. But this would be a serious misimpression. Upon closer analysis, this opinion merely conveys the thought that where a statute provides for unification in *every* mode and manner (other than by descent), including *both* consolidation and merger, arguments be-

The true nature of the transaction in the light of pertinent statutes, rather than the name by which the parties denominate the transaction, determines whether a consolidation, merger or other type of unification has been attempted under Illinois Law. *C.T. & T. Co.* v. *Zinser,* 274 Ill. 31, 34-35, and cases therein cited; *McRoberts* v. *Minier,* 270 Ill. App. 1, 10-11.

The Illinois Banking Act as it existed in 1933, the only Illinois legislation under which the 1933 unification and integration here involved might have occurred, provides for two, and only two, types of unification and integration: (1) a consolidation, and (2) a sale of assets by one bank to another which assumes the liabilities of the former, with the approval of the State Auditor. Ill. Rev. Stat., Smith-Hurd ed., 1933, Ch. 16½, Sec. 12. (Appendix, pp. 18-29).

In construing the consolidation provisions of Section 12 of the Illinois Banking Act in relation to a 1925 transaction, the Illinois Appellate Court, in the case of *McRoberts* v. *Minier,* 270 Ill. App. 1, followed the rules expressed by the

---

tween the parties wherein they point to differences in the conventional forms of contracts customarily used to effectuate one or the other type of unification as a basis for their respective contentions that one or the other type had occurred, are of little importance in illuminating the issue for two reasons: first, the corporations involved had used both terms in their unification agreement; and, second, the court took notice of the fact that corporations in their agreements do not always use such terms with strict accuracy.

That the Illinois rule of decision is to require banking corporations, as well as all other corporations, to exercise corporate powers *only in the mode and manner prescribed by statute* is well established from earliest Illinois jurisprudence. *Metropolitan Bank* v. *Godfrey,* 23 Ill. 531 (originally at p. 579). *Fridley* v. *Bowen,* 87 Ill. 151, 154; *Diversey* v. *Smith,* 103 Ill. 378, 388; *McNulta* v. *Corn Belt Bank,* 164 Ill. 427, 445; *C. T. & T. Co.* v. *Doyle,* 259 Ill. 489, 492; *Cont. Ill. Nat. Bk. & Trust Co.* v. *Peoples Trust & Sav Bk.,* 366 Ill. 366, 374-377; *State Bank of Blue Island* v. *Benzing,* 383 Ill. 40, 54. See, also, *Calumet etc. Dock Co.* v. *Conkling,* 273 Ill. 318, 322-323; *Nat. Home Bldg. & Loan Assn.* v. *Home Sav. Bank,* 181 Ill. 35, 40-43. To the same effect with respect to National banks, see *Drover's & Mech. Nat. Bank* v. *First Nat. Bank,* (C.A. 4) 260 Fed. 9, 14; *Rural Agr. School Dist. No. 1* v. *Guardian Nat. Bank* (D.C.) 6 F. Supp. 482, 485.

Illinois Supreme Court in the *Doyle* case, just set forth, stating that when empowering legislation does not expressly give a power or right to unify and integrate, e.g., by consolidation or merger, "it is regarded as a prohibition against the exercise of such power" (citing *American Loan & Trust Co.* v. *Minnesota & Northwestern R. Co.*, 157 Ill. 641), and holding that the consolidation contemplated by Section 12 of the Illinois Banking Act was one where "the effect . . . is the dissolution of the constituent companies" which "cease to exist as legal entities" and where "a new corporation comes into existence" (270 Ill. App. 1, 11).

The fact that the parties in the *McRoberts* case "inadvisedly used the words 'consolidate' and 'consolidation' " was deemed to be of no importance by the Illinois Appellate Court (270 Ill. App., p. 10) since it is the true nature of the transaction, rather than the name by which it is called, which determines whether it meets the test of a consolidation under the Illinois statute.

When contrasted with the definition of consolidation as set forth by the Illinois Supreme Court in the *Doyle* case (259 Ill. 489, 493) and *Zinser* case (264 Ill. 31, 33-35), and by the Illinois Appellate Court in *McRoberts* v. *Minier* (270 Ill. App. 1, 10-11, construing the Illinois Banking Act), that is, that the uniting corporations are dissolved and pass out of existence in favor of a new corporation which supersedes them, it is indisputable that the type of unification provided for under the McFadden Act, as amended in 1933, *is one of merger, and is not to be considered a consolidation under the Illinois Banking Act.*

The *continuation of existence* by the constituent corporations under the McFadden Act manifestly is not the same as the *passing out of existence* under the consolidation provisions of the Illinois Banking Law. It is precisely this

difference which represents the fundamental distinction by definition between merger and consolidation under the Illinois Rule of Decision. Cf. *Atlantic & Gulf R.R. Co.* v. *Georgia,* 98 U.S. 359, 361,363; *Keokuk & W.R. Co.* v. *Missouri,* 152 U.S. 301, 305-310.

Absent Illinois legislation authorizing merger, the merger of respondent bank and the First Union was prohibited by the Illinois law (*American Loan and Trust Co.* v. *Minnesota and Northwestern Railroad Co.,* 157 Ill. 641) and, therefore, was *ipso facto* prohibited by the National Banking Act as being "in contravention of the law of the State."*

No comfort may be derived by respondent bank from the fact that the purported consolidation had the approval

---

* Anticipating a possibility that respondent bank would see fit to argue to the Court of Appeals that Illinois banks were authorized to engage in mergers by virtue of inferences which might be drawn from the last three paragraphs of Section 12 of the Illinois Banking Act, added by amendment in 1929 (See Jones Ill. Stat. Ann., Vol. 2, par. 10-13), petitioners directed the Court of Appeals' attention to these paragraphs, showed that these were transplanted in *haec verba* from Section 73 of the Illinois General Corporation Act of 1919, as amended in 1921 (See Illinois Bus. Corp. Act Ann., 1934 ed., pp. 256-257), an act not applicable to banking corporations and which specifically authorized corporations within its purview to engage in mergers, leases, sales and exchanges, as well as consolidations, in contradistinction to the Illinois Banking Act, and demonstrated that under the Illinois rule of construction, as appears from *American Loan & Trust Co.* v. *Minn. & Northwestern R.R. Co.,* 157 Ill. 641, 650 (in accord, see *Kavanagh* v. *Omaha Life Ass'n.* (D.C.) 84 Fed. 295, 296), the powers of an Illinois banking corporation are not to be implied from these provisions which, on their face, do not purport to grant powers to the corporation but merely provide for the protection of interested parties in connection with any corporate unification and integration. This necessarily follows from the public policy in Illinois to regard the banking business as being impressed with a public interest and subject to strict regulatory legislation, *Continental Ill. Nat. Bk. & Trust Co.* v. *The Peoples Trust & Sav. Bk.,* 366 Ill. 366, 374, pursuant to which there has developed in Illinois the rule of construction which resolves against the banking corporation all ambiguities in the statutory grant of powers thereto. *People* v. *Wiersma State Bank,* 361 Ill. 75, 87-88. Cf. *Louisville & N. R. Co.* v. *Kentucky,* 161 U. S. 677, 684.

(Since respondent bank did not choose to make such argument and since the Court of Appeals ignored the question of whether the Illinois Banking Act authorized Illinois banks to engage in mergers as distinguished from consolidations, petitioners refrain from further amplification of the argument at this time.)

of the Illinois Auditor of Public Accounts. This act of approval was entirely without legal significance, as appears from the case of *American Loan and Trust Company* v. *Minnesota and Northwestern Railroad Company,* 157 Ill. 641, where, in disposing of a similar contention, the Illinois Supreme Court stated (p. 653):

> "In the case at bar there was no statute under which the consolidation could have been made, and the act of the Secretary of State in filing and recording the agreement for consolidation was wholly without warrant or authority of law, and consequently had no effect to either legalize the supposed consolidated company or give it the status of a *de facto* corporation."

Having demonstrated that the form of unification in 1933 was that of a merger, as was decided by the District Court below (84 F. Supp. 918, 923; R. 403, 428; also, *In re Estate of Busby,* 288 Ill. App. 500, 506; cf. *Defoe* v. *Board of Public Instruction* (C.A. 5) 132 F. 2d 971, 972), and that the purported merger was without sanction of State or Federal law, the *American Loan & Trust Company* case states the consequences from the standpoint of Illinois law (157 Ill. at p. 654): Under the Illinois Rule of Decision, the First National Bank of Chicago "is not, and never was, a corporation, either *de jure* or *de facto* . . . there was no corporation in existence with capacity to . . . contract or act . . ."* See also *State Bank of Blue Island* v. *Benzing,* 383 Ill. 40, 51-55.

Another ground for asserting that the 1933 "consolidation" was unlawful is the fact that the Illinois Banking

---

* It is outside the scope of this case, and therefore unnecessary to decide, whether the First National Bank of Chicago exists as a National bank, under Federal law. Parenthetically, since the National bank existed prior to the unauthorized merger and, by virtue of the McFadden Act, continued its existence under its charter after the merger, it would seem that the legal existence of the National bank would remain unimpaired despite the illegality of the merger. See *Worcester County Nat. Bk., Pet.,* 263 Mass. 444, 162 N.E. 217, 221.

Act did not expressly authorize a unification (not even a consolidation) between a State bank and a National banking association. The manifest intent of the Illinois legislature in authorizing consolidations under Section 12 of the Illinois Banking Act was to make it possible for Illinois banks to consolidate with each other and to absorb and bring within the fold of the Illinois banking structure, and thus under Illinois regulatory control, those corporations doing business in Illinois which may have some banking powers but which were not organized to, and did not, conduct a general banking business under the Illinois Banking Act. This intent plainly emerges from Sections 12, 13, 2, 3, 4, 5 and 8 of the Illinois Banking Act (Smith-Hurd Ill. Rev. Stat., 1933, Ch. 16½, Sec. 12, 13, 2, 3, 4, 5 and 8; see Appendix, pp. 18-28) which sections, when read together, make clear that the requirements imposed upon corporations entering into a consolidation are as stringent and subject to the same degree of investigation and supervision by the State Auditor as in the case of an association of persons desiring to form an Illinois bank in the first instance; and, that the newly consolidated corporation becomes subject to the Illinois Banking Act as fully as if organized under the Act in the first instance.

The conclusion that the purpose of the consolidation provisions of the Illinois Banking Act was to bring banks into the fold of the Illinois banking structure and under Illinois' regulatory jurisdiction becomes irresistible when it is considered that the directors of the newly consolidated corporation, as an indispensable condition of such consolidation, must take an oath of fealty, including a promise not to violate nor to permit violations of the Illinois Banking Act (Sections 13 and 4), and when it is further considered that the newly consolidated corporation, being

subject to the Illinois Banking Act, is to be free of all visitorial powers except those prescribed by that Act (Section 8).

This construction of the consolidation provisions of the Illinois Banking Act finds support in the view taken by the Virginia Supreme Court of its banking laws in the case of *Hofheimer* v. *Seaboard Cit. Nat. Bk. of Norfolk,* 154 Va. 392, 153 S.E. 656, where the Virginia Court held (153 S.E., at pp. 657-658) that a statute authorizing a Virginia bank to merge or consolidate with a National bank did not contemplate that the National bank would absorb the State bank, as under the McFadden Act, but rather that the State bank was empowered to absorb the National bank and thereby bring it into the banking structure of the State, under the State's jurisdiction.

Such a construction of the Illinois Banking Act is strongly fortified by a consideration of the nature of its 1917 and 1929 amendments. Prior to 1917, no mention whatsoever was made in the Illinois Banking Act of a bank organized or incorporated under the laws of the United States. In 1917, two references were inserted into the Illinois banking laws concerning corporations or banks incorporated under the laws of the United States, the details of which are immaterial here. Harker's Ill. Stat. Ann., 1919 ed., Vol. 1, pp. 328, 338-339. By amendments made in 1929, banks organized or incorporated under the laws of the United States were referred to in Sections 12 and 15 (see Appendix accompanying this petition, pp. 23-27, 28-29). Under these amendments, a State bank was authorized, by vote of two-thirds of its directors and with the approval of the State Auditor, to sell all or part of its assets to another bank, including a National bank, if the latter assumed all of its liabilities except to its stockholders (Sec. 12); and

by virtue of such an assumption agreement, liquidation and dissolution of the State bank was facilitated (Sec. 15).

Notwithstanding that the legislature saw fit in 1917 and 1929 to amend the Illinois Banking Act so as to specifically refer to National banks in various connections, nothing was inserted in the Act purporting to authorize State banks to unite with National banks *except through the one specified method* of a sale of assets coupled with an assumption agreement, and then only when the State Auditor regarded such a transaction as necessary in order to protect the State bank's creditors.

It is well established law in Illinois that the power to unify by purchase and assumption is not the same as the power to unify by consolidation or merger (*Chicago Title & Trust Co.* v. *Doyle,* 259 Ill. 489, 495-496), and, further, that a corporation is prohibited from exercising any power not expressly granted to it. *Knass* v. *Madison & Kedzie Bank,* 354 Ill. 554, 561. Moreover, it is elementary that the grant of corporate power to do a certain thing in a particular mode or manner amounts to a prohibition to do the same in any other mode or manner. *The Metropolitan Bank* v. *Godfrey,* 23 Ill. 531 (originally at p. 579), 552; *Fridley* v. *Brown,* 87 Ill. 151, 154; *Diversey* v. *Smith,* 103 Ill. 378, 388; *McNulta* v. *Corn Belt Bank,* 164 Ill. 427, 445.

Since the legislature is presumed to have acted with knowledge of these rules when it made the 1917 and 1929 amendments (*People* v. *Hinrichsen,* 161 Ill. 223, 226; *Village of Glencoe* v. *Hurford,* 317 Ill. 203, 219), the conclusion is inescapable that by adding a power to unify through purchase and assumption, and *by refraining from adding a power to unify with National banks through any other means,* the legislature intended to leave in force the prohibition against unification with National banks through

any other method except the one specified in the 1929 amendment. That this is the way in which the Illinois Banking Act is to be construed after its amendment in 1929 is made clear in the recent case of *State Bank of Blue Island* v. *Benzing,* 383 Ill. 40, 53-55, in which the Illinois Supreme Court construes the 1929 amendment insofar as it authorizes an additional means of voluntary liquidation, and in which it reiterates and applies the rule that any power not expressly conferred is deemed to be prohibited. Cf. *Louisville & N.R. Co.* v. *Kentucky,* 161 U.S. 677, at pp. 686-689.

Thus, based upon the tenor of the Illinois Banking Act, taken as a whole, and in view of the implications arising from the fact and nature of the 1917 and 1929 amendments to the Act, it is clear that an Illinois bank is without authority to effectuate, and, therefore, is prohibited from effectuating, any kind of unification and integration with a National bank other than the one expressly provided for under the Act, i.e., a sale of its assets coupled with an assumption agreement.

The opinion of the Court of Appeals in the case at bar cites three Illinois authorities for the proposition that Illinois law would not be contravened by the unification and integration here involved under the McFadden Act: a dictum in *McRoberts* v. *Minier,* 270 Ill. App. 1, 10, and a holding in *First National Bank* v. *Lindberg,* 293 Ill. App. 474, 481 (both decisions being by an intermediate court of appeals in Illinois), and an opinion by the Attorney General of Illinois in 1927.

The question in the *McRoberts* case was whether a form of liquidation agreement entered into between a State bank and a National bank in 1925, *before the McFadden Act,* could be regarded as a consolidation under the Illinois Bank-

ing Act. The Illinois Appellate Court held that it could not, since at that time, before the McFadden Act, National banks had no authority under Federal law to consolidate with State banks; moreover, that the transaction, upon analysis, would not qualify as a consolidation under Illinois law because no new corporation arose by virtue thereof and the State bank was continued in existence. Purely as dictum, and in complete error as here shown, the Court in the *McRoberts* case made the unsupported and unsupportable assertion that an Illinois bank had authority to consolidate with a National bank insofar as Illinois law was concerned.

In the *Lindberg* case, the question before the Illinois Appellate Court was whether a mortgagor in a foreclosure suit could escape enforcement of the mortgage lien on his property upon the ground that the substituted plaintiff, the First National Bank of Chicago, was not the indenture trustee and its succession thereto was founded upon an illegal consolidation under the McFadden Act. The court held that the mortgagor could not evade foreclosure and that under these circumstances his attempt to do so amounted to a collateral attack upon the consolidation, relying upon that part of the decision in *Casey* v. *Galli*, 94 U. S. 673, 679-680, which so held. See *Gray* v. *First Nat. Bk.*, 294 Ill. App. 62, 71. Since the foreclosure suit was brought by a proper plaintiff in the first instance and, therefore, the jurisdiction of the equity court over the defendant and his property had attached, it is manifest that the equity court could have enforced the mortgage lien whether or not the First National Bank of Chicago was a properly substituted plaintiff. See *Gray* v. *First Nat. Bk.* 294 Ill. App. 62, 68. Therefore, it was of little importance that the court incidentally held that the McFadden Act authorized the consolidation upon which the First National

Bank's status as substituted plaintiff depended. In so holding, the court observed that nothing had been called to its attention requiring specific authorization under Illinois law to legalize the consolidation, thereby implying that under the court's construction of the Illinois law there was no authorization for the Illinois bank to consolidate with the National bank.

The opinion of the Illinois Attorney General cited by the Court of Appeals (Opinion No. 1125, July 26, 1927), misconceiving the scope of the authority of *Casey* v. *Galli*, 94 U. S. 673, stated that the McFadden Act of 1927 permitted a consolidation between Illinois banks and National banks, and that the Attorney General had failed to find any provision of the State Banking Act which would be contravened thereby. Apart from the fact that the opinion of the Illinois Attorney General put a misplaced reliance upon *Casey* v. *Galli*, it is not authoritative as to Illinois law in view of the force of many decisions of the Illinois Supreme Court with which it is in conflict. Moreover, the Attorney General's opinion was expressed before the 1933 amendment to the McFadden Act, which changed the character of unification and integration contemplated by the Act from that of consolidation to that of merger, as regarded by Illinois law. The element of the Attorney General's opinion which is of prime significance to the instant case, and which the Court of Appeals appears to have overlooked, is that part defining the consolidation authorized under Illinois law to be one in which "the constituent corporations by operation of law cease to exist" in favor of a "new corporation".

It may be seen, then, that these three Illinois authorities, relied on by the Court of Appeals, being opposed to the force of numerous Illinois Supreme Court decisions,

cannot be deemed authoritative even as to whether a *consolidation* between Illinois and National banks would contravene Illinois law, let alone whether the *merger* contemplated by the McFadden Act, as changed in 1933, would do so. Obviously, the *McRoberts* case dictum and the 1927 opinion of the Illinois Attorney General did not reach the merger question because they were concerned with transactions before 1933. And since the merger question was not raised, briefed or argued by the parties, nor considered by the Court, in the *Lindberg* case, it is elementary that this case could not be authority on the point. *Hopkins Fed. Sav. & Loan Ass'n* v. *Cleary,* 296 U. S. 315, 342-343.

The true import of the *McRoberts* decision and the 1927 opinion of the Illinois Attorney General is, at most, that Illinois banks may enter into unifications under which the constituent banks pass out of existence in favor of a new corporation, and, therefore, by necessary implication, that Illinois banks cannot enter into the unification and integration contemplated by the McFadden Act after the 1933 amendment, under which no new bank comes into being and the State bank continues its existence in a dematerialized form—a type of unification and integration which can be characterized only as a merger under Illinois law.

Apart from the fact that the *Lindberg* case did not consider or decide whether Illinois banks may enter into mergers, as distinguished from consolidations, it will be seen that the *Lindberg* case is not authoritative even with reference to the power of an Illinois bank to enter into consolidations with National banks, in view of its implied recognition that the Illinois Banking Act granted no specific authority to Illinois banks to consolidate with National banks. Manifestly, the holding of the *Lindberg* case, that consolidation was permissible despite lack of specific au-

thority therefor under the Illinois Banking Act, was wholly at variance with a long and uninterrupted line of decisions by the Illinois Supreme Court, decided *both before and after* the *Lindberg* case, all of which are unequivocally to the effect that any power not granted to an Illinois bank or other corporation is deemed to be expressly prohibited, as much as though such prohibition were physically incorporated into the text of the statute itself. *People* v. *Wiersema State Bank,* 361 Ill. 75, 87, 94; *American Loan & Trust Co.* v. *Minn. & N.W.R. Co.,* 157 Ill. 641, 651, 654; *Knass* v. *Madison & Kedzie Bank,* 354 Ill. 554, 561-562; *Continental Ill. Nat. Bank & Trust Co.* v. *The Peoples Trust & Savings Bank,* 366 Ill. 366, 374-375; *State Bank of Blue Island* v. *Benzing,* 383 Ill. 40, 52-53.

The Court of Appeals for the Seventh Circuit in other cases had no difficulty in finding and applying this bed rock rule of Illinois law with reference to the powers of Illinois banks, as appears from the text of those decisions and particularly from the Illinois decisions therein cited, especially *People* v. *Wiersema State Bank,* 361 Ill. 75. See *Sneeden* v. *City of Marion* (C.A. 7), 64 F. 2d 721, 726; *Granzow* v. *Village of Lyons, Ill.,* (C.A. 7), 89 F. 2d 83, 85; *LaParr* v. *City of Rockford, Illinois,* (C.A. 7), 100 F. 2d 564, 566-567; *Joseph* v. *Village of Downers Grove,* (C.A. 7) 104 F. 2d 974, 979. The Supreme Court, itself, recognized this rule of Illinois law in affirming the *Sneeden* case (*Marion* v. *Sneeden,* 291 U. S. 262, 269). To the same effect, see *Farley* v. *Albers* (App. D.C.) 112 F. 2d 401, 403.

That the Illinois Appellate Court, in the *McRoberts* and *Lindberg* cases, and the Illinois Attorney General, in his 1927 opinion, were not applying any doctrine of Illinois law in suggesting that no prohibition arises from the failure to grant a corporate power is demonstrated from the

case of *Alexander* v. *Bankers Union of Chicago,* 187 Ill. App. 469, 476-477, where precisely the same contention was made and rejected.

(2)

The McFadden Act was never intended to confer powers upon State banks, but only upon National banks. Any other construction would render the McFadden Act unconstitutional.

Having demonstrated that the Illinois Banking Act, as construed in accordance with well established rules of construction applied by the Supreme Court of Illinois, prohibits the purported unification and integration of 1933 involved in this case, and having shown that the Court of Appeals for the Seventh Circuit knew and had applied the Illinois rule of construction no less than four times prior to its opinion in the case at bar, it seems clear that its disregard of the Illinois rule of construction in the case at bar must be predicated upon two assumptions: *First,* that the McFadden Act was intended to confer powers, not only upon National banks, but upon State banks as well; and, *Second,* that State banks were authorized to act under the Federal grant of power in the McFadden Act unless such action would be "in contravention of the laws of the State," and that these quoted words were to be read as though they meant "in contravention of the statutes of the State, divorced and separated from the rules of construction applied to said statutes by the Supreme judicial authority of the State." Petitioners will show that both of these propositions are erroneous, dealing with the first under this point, and discussing the second under point (3), *post.*

The Court of Appeals, in adopting the view that the McFadden Act purported to give powers to State banks, over-

looked a most significant fact: **that the whole tenor of the National Bank Act is to confer powers exclusively upon National banks.** Like Illinois banks, National banks have only such powers as their legislative creator has bestowed upon them, and any power not granted is deemed to be prohibited. *Texas & P. R. Co.* v. *Pottorff*, 291 U. S. 245, 253. If the McFadden Act is to be read as though it were intended to confer express power upon State banks, where may a grant of power to the National banks to enter into these unifications be found? Does it not seem absurd that Congress intended to confer express power upon State banks and forgot to confer express power upon its own creatures, the National banks, leaving the National banks in the ignominious position of having to seek out their power, if any, from implications arising out of the grant of power to State banks?

Such a construction is certainly not a necessary one. It is a fundamental principle that there must be legal ability to enter into a transaction on the part of each party thereto. *Louisville & Nashville Rd.* v. *Kentucky*, 161 U. S. 677, 691-692. It would be of no avail for a State bank to have the ability to enter into a unification with a National bank if the National bank was without power from its creator to do so, and vice versa. *McRoberts* v. *Minier*, 270 Ill. App. 1, 10.* Normally, each sovereign grants power to its own, and each party, having matching or corresponding power from its creator, is thus enabled to enter into a legal transaction. *Louisville & Nashville Rd.* v. *Kentucky*, 161 U. S. 677, 691-692. It may be logically assumed, therefore, that the pri-

* In *Com.* v. *Merch. Nat. Bank*, 1936, 323 Pa. 145, this precise point was passed on, where the Pennsylvania Supreme Court said (p. 151). "The Federal legislation, while evidencing the terms and conditions of Federal consent to the absorption of a State bank by a National bank, did not, and because of the Tenth Amendment to the Federal Constitution (*Hopkins* v. *Cleary*, 296 U. S. 315) could not, confer authority on the trust company to consolidate its franchises and property with those of the bank. What was lacking to make the consolidation *de jure*, was authority from the commonwealth pursuant to whose law the trust company existed."

mary purpose of Congress in enacting the McFadden Act was to bestow matching or corresponding power upon its own creature, the National bank—a construction which comports with the normal and the probable and is consistent with the mutual deference displayed between sovereigns in fields of concordant exercise of National and State power. *First National Bank* v. *Fellows ex rel. Union Trust Co.*, 244 U. S. 416, 426-428.

If that be the primary purpose of the Statute, it becomes highly questionable, in the light of this new perspective, to imply from the grant of power to the National bank an intent to grant power to the State bank. Apart from the doubtful constitutionality of any attempt by Congress to grant powers of such far reaching consequences to State banks, the language of the statute strongly militates against such a construction. In clause after clause the so-called consolidation provisions of the McFadden Act recite an explicit intent to make the State law predominate, preserving to the States not only the right to dictate whether the State bank may consolidate, but also the right to prescribe the percentage of the State bank's stockholders who must approve the proposed consolidation, the amount of notice to its stockholders, and the mechanics by which dissenting stockholders may have their interests liquidated. Moreover, the intent to make the State law predominate is manifested in the express preservation of the right of State courts to remove the consolidated bank as a successor fiduciary when such removal is not effected to discriminate against National banks.

These repetitive expressions of Congressional intent to make the Federal law subservient to State law has persuaded this Court that the paramountcy of State law was intended to be extended to all consequences of consolidation, even though the Act did not so specifically state. Thus, insofar as the consequences of a McFadden Act consolida-

tion are concerned, this Court has held that State law was intended to be paramount, not merely with respect to the right to remove the consolidated bank as successor fiduciary, but also in respect of the right to prevent the consolidated bank from succeeding to the fiduciaryships in the first instance, despite the language of the Act purporting to make such succession automatic and subject only to the right of removal. *Ex Parte Worcester County Nat. Bank,* 279 U. S. 347, 359-360. For the same reasons, having in mind that such a construction would be unnecessary and a departure from the normal, as well as of questionable constitutionality, it seems far fetched to attribute to Congress an intent to recruit State banks by bestowing powers of unification and integration upon them which the State of their creation failed to grant and which, in Illinois, is thereby deemed to have been prohibited.

The construction which has been placed upon the consolidation provisions of the McFadden Act by the Court of Appeals in the instant case raises a constitutional question. That is, if the Act is intended to grant powers of unification and integration to State banks in the absence of powers granted by the State, has not Congress overstepped the bounds of constitutional propriety?

A misconceived doctrine has evolved from language appearing in the case of *Casey* v. *Galli,* 94 U. S. 673, 678, relating to the conversion of a State bank into a National bank, to the effect that it was the holding there that it was constitutional for Congress to grant power to a State bank to transmute itself into a National bank and, therefore, *a fortiori,* that it was constitutional for Congress to grant a State bank power to unify and integrate with a National bank. The proponents of this doctrine cite *Ex Parte Worcester Nat. Bank,* 279 U. S. 347, as their authority. But this Court, in *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary,* 296 U. S. 315, 334, 341-343, has cut the ground out from

under this doctrine by distinguishing the case upon which it is founded, *Casey* v. *Galli*, as a decision not reaching a constitutional question.

Moreover, the decision in *Ex Parte Worcester Nat. Bank*, on proper analysis, will be seen as not passing upon the question as to whether, if construed as conferring the power of unification and integration upon State banks, the McFadden Act would overstep the bounds of constitutional propriety. Therefore, as between the cases of *Casey* v. *Galli*, *Ex Parte Worcester Nat. Bank* and *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary*, the latter is the only decision of the three having any quality of authority with reference to the constitutional limits of Congressional action in attempting to grant powers to State corporations.

If the McFadden Act were intended to grant powers of unification and integration to State banks in the absence of authorization by the State, as construed by the Court of Appeals in the instant case, then the broad reasoning which impelled this Court to strike down Section 5(i) of the Home Owners Loan Act in the case of *Hopkins Fed. Sav. & Loan Assn.* v. *Cleary*, should lead this Court to reject the construction placed upon the McFadden Act by the Court of Appeals in the instant case.

Closely comparable to the critical question presented in the *Hopkins* case (296 U. S., at p. 336), the crucial question here is whether the power of Congress to create National banks and invest them with corporate capacity carries along with it the constitutional right to enable a State bank, without sanction under State law, to abandon its name, transfer all of its property and fiduciaryships, cease business and all functions as a State bank, and lead a dematerialized existence under the Federal charter of a National bank which absorbed it and is under the primary regulatory control of the Federal government. The language of the *Hopkins Fed.*

Sav. & Loan Ass'n. case seems especially illuminating in passing upon this question (296 U. S., at pp. 336, 337, 338, 339):

> "They (in that case, State building and loan associations) have been given corporate capacity in the belief (end of p. 336) that their creation will advance the common weal. The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi-public instruments. . . . They may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it. . . . How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred (p. 337) . . . The destruction of associations established by a State is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends (pp. 338-339) . . ."*

Notable, too, in line with this Court's quoted observations, is the fact that public policy in Illinois attaches prime

---

* While the *Hopkins Fed. Sav. & Loan Ass'n* case did not purport to decide whether its doctrine would apply to the banking field, yet there seems to be no reason why it should not, and it is noteworthy that in making the statement quoted in the text above, this Court took occasion to make footnote reference to a case involving the interrelationship of National and State banks, intimating that the doctrine applies to the banking field as well. See 296 U.S., at p. 339, fn. 6. Moreover, if this Court had any misgivings as to whether the broad doctrine of constitutional limits on Congressional action expressed in the *Hopkins Fed. Sav. & Loan Ass'n.* case were applicable to the banking field, it is extremely difficult to rationalize the lengths to which this Court went, not merely to distinguish the *Casey* v. *Galli* case on the ground it related to the banking field, but to subject that case to a rigorous analysis designed to destroy the misimpression that it decided a constitutional question. This precaution would have been totally unnecessary if the banking business were deemed to have provided a basis of distinction sufficient unto itself.

importance to any change in sovereign control over the affairs of banking institutions, as appears from *Penn* v. *Fogler*, 182 Ill. 76, 98, 104; *People* v. *Brady*, 271 Ill. 100, 112-113.

As opposed to the force of the reasoning in *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary*, the proponents of the supposed doctrine of *Casey* v. *Galli*, rely upon the holding of *Ex Parte Worcester County Nat. Bank*, 279 U. S. 347. That case came up for review on an appeal by the Worcester County National Bank from a decree of a Massachusetts State Court under Section 237(a) of the Judicial Code, as amended (43 Stat. at L. 936, 937, U. S. C., T. 28, Sec. 344(a)). The holding of the Massachusetts court, made without benefit of any briefs or arguments in opposition to the bank (see Mo. and Bf. of Mass. Atty. Gen'l case No. 469, this court, Oct. Term, 1928), involved two findings: *First*, that it was the rule of decision in Massachusetts that a Massachusetts trust company could consolidate with a National bank pursuant to the McFadden Act, in that such consolidation would not be in contravention of Massachusetts law, even though there was no State legislation which granted such power.* *Second*, that the McFadden Act of 1927 was unconstitutional to the extent it purported to make the consolidated National bank the automatic successor to the State trust company as executor, in that such a succession could not occur without judicial appointment under Massachusetts law.

On its appeal to this Court in the *Worcester Bank* case, the consolidated National bank did not question the propriety of the Massachusetts court's determination that its

---

* In reaching this conclusion, the Massachusetts court reviewed the public policy of the State as expressed in its statutes and decisions, and found, in substance, that the public policy had favored and apparently still favored transmutations and, *a fortiori*, consolidations as well. *Worcester County Nat. Bk., Pet.*, 263 Mass. 444, 162, N.E. 217, 218-220.

consolidation was valid, since, in that respect, the holding was in its favor. The bank limited its challenge to the second determination, that the McFadden Act was unconstitutional, taking the position that the provisions of the Act for automatic succession by the consolidated National bank to the State trust company's executorships were constitutional, even though such provisions, as construed by the Massachusetts court, were designed to override Massachusetts law. (See Appellant's Bf., in case No. 469, this Court, Oct. Tm., 1928.)

The Attorney General of Massachusetts, as the only party in opposition to the appellant bank, sought merely to uphold the decision of the Massachusetts court against the attack of the appellant, not raising any question as to validity of the consolidation. (See Motion and Bf. of Mass. Atty.-Gen'l. in Case No. 469, this Court, Oct. Tm., 1928.) Thus, the only issue presented by the parties for review there was whether the McFadden Act of 1927 was unconstitutional to the extent it had been construed to make the consolidated National bank the automatic successor to the State trust company as executor in contravention of Massachusetts law. Since the parties did not pose to this Court any question as to the validity of the consolidation, it seems plain that little, if any, importance can be attached to the circumstance that this Court summarized the State Court's reasoning which had led the latter to conclude that the consolidation was valid.

In short, upon appeal in the case of *Ex Parte Worcester County Nat. Bk.* presenting for review the sole question as to the right of the consolidated National bank to succeed automatically to an executorship as the result of a McFadden Act consolidation, this Court, as pointed out in *State ex rel. Cleary* v. *Hopkins St. B. & L. Asso.*, 217 Wis. 179, 195, 257 N. W. 684, 690, accepted as the rule

of decision in Massachusetts the determination by the Supreme Judicial Court of Massachusetts that the consolidation did not contravene Massachusetts law. Since the Massachusetts court held that Massachusetts law was not contravened by the consolidation, and inasmuch as it was unquestioned and unquestionable that the McFadden Act authorized the National bank to enter into the consolidation, this Court agreed with the conclusion of the Massachusetts court that the consolidation was valid and went on to consider the only issue presented upon review, the extent to which the McFadden Act dictated the consequences flowing from a consolidation under it.

With reference to the latter issue, this Court avoided considering whether the McFadden Act, as construed by the Massachusetts court, would be unconstitutional, since it held that the Massachusetts court had misconstrued the Act. The holding of this Court thus emerges as one not deciding any of the constitutional questions involved in the instant case, and certainly is in no way inconsistent with the later decision of *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary,* 296 U. S. 315. Moreover, by saying that the construction adopted here, as opposed to that of the Massachusetts court, "makes it possible . . . to . . . preserve the *constitutional* effectiveness" of the so called consolidation provisions of the McFadden Act (279 U. S., at p. 362), this Court strongly implied that if Congress had intended to override Massachusetts law, these provisions of the McFadden Act would be unconstitutional, presumably upon the same considerations given more explicit and elaborate expression in the later case of *Hopkins Fed. Sav. & Loan Ass'n.*

That it would be a transgression of the Tenth Amendment for Congress to attempt the endowment of State banks with such far reaching powers as those of unification and inte-

gration contemplated by the McFadden Act not only follows from the broad doctrine of *Hopkins Fed. Sav. & Loan Ass'n.* v. *Cleary,* but is made clear by other Federal and State authorities. In the case of *Fulton* v. *Lloyds Cas. Co.,* (C. A. 6) 75 F. 2d 295, the Court said (p. 297): "... the powers of a State bank cannot be enlarged by the Federal law ..." In *Farley* v. *Albers,* (App. D. C.) 112 F. 2d 401, the Court said (p. 403): "And we are admonished in the opinion in the *Pottorff* case (291 U. S., at p. 257, fn. 11)—which we are told is still to be accepted as the law—that Congress cannot make valid a pledge by a State bank where the power is lacking under its charter or the laws of the State." And in *Com.* v. *Merchants Nat. Bk. of Allentown,* 323 Pa. 145, 185 Atl. 823, the Court said (p. 826): "The Federal legislation, while evidencing the terms and conditions of Federal consent to the absorption of a State bank by a National bank, *did not, and because of the Tenth Amendment to the Federal Constitution* (*Hopkins Federal Savings & Loan Ass'n.* v. *Cleary* . . .) *could not,* confer authority on the trust company to consolidate its franchise and property with those of the bank."

In summary, it is clear that the construction given the McFadden Act by the Court of Appeals in the instant case, that it was intended to endow State banks with powers of unification and integration not granted to them by State law, is a construction wholly unnecessary, a radical departure from the normal and the likely, and is not only barren of support under precedents but also seems to be precluded on constitutional grounds, as seen from the authority of this Court, other Federal courts and the Supreme Court of Pennsylvania.

(3)

The McFadden Act is not to be construed as though a special rule has been created for the construction of State banking statutes which supersedes the State rule of construction of such statutes.

In upholding the merger, the Court of Appeals in the instant case disregarded the Illinois rules of construction, well known to the Court from four of its own previous decisions, thereby ruling, in effect, that the Illinois Banking Act is not to be construed according to Illinois rules of construction, but rather according to a special rule of construction created by the McFadden Act—as though the words in the McFadden Act, "in contravention of the laws of the State" were to be read "in contravention of the statutes of the State, divorced and isolated from the rules of construction applied to such statutes by the Supreme judicial authority of the State."

Petitioners contend that this further construction of the McFadden Act is unnecessary and represents a marked departure from the normal and the likely. Moreover, it conflicts with deeply imbedded doctrines long and well established by the decisions of this Court.

That this construction is unnecessary and represents a radical departure from the normal and the likely clearly appears upon recurrence to rudimentary principles. It is fundamental and normal that corporate creatures of different sovereigns may deal with each other only if each has been endowed by its creator with power to do so. *Louisville & Nashville Rd.* v. *Kentucky,* 161 U. S. 677, 691-692. It is to be assumed, therefore, that the primary purpose of the McFadden Act was to create authority for National banks, even if, *arguendo,* its secondary purpose was to create a source of power for State banks as well. In accomplishing

this supposed secondary purpose, great weight must be attached to the *caveat* of Congress that State banks are not to exercise powers granted under the McFadden Act if to do so would violate State law. Normally, State law is what the State declares it to be, not merely through its statutes, but also through its courts. *Leffingwell* v. *Warren,* 67 U. S. (2 Black) 599, 603; *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32. It is a novel doctrine, to say the least, which would attribute to Congress an intent to construe State statutes, not as the courts of the State construe them, but according to the literal meaning of the naked State statutes. There is certainly nothing in the McFadden Act which compels a court to take such a distorted view of State public policy.

The construction placed upon the so-called consolidation provisions of the McFadden Act by the Court of Appeals in the instant case appears to be in conflict with deeply imbedded doctrines long and well established by the decisions of this Court. A very similar problem was presented in *Knights of Pythias* v. *Meyer,* 265 U.S. 30, where the exercise of corporate power under a Federal statute was made to depend upon whether it would "conflict with the laws . . . of any State." Since there is no material difference between the quoted words of the statute in that case and the pertinent words of the McFadden Act here under scrutiny, that is, "in contravention of the laws of the State", it is manifest that the decision in the *Knights of Pythias* case is authoritative on how these words are to be construed. In that case this Court said (265 U.S., at pp. 32-33):

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein. See, for example, *Leffingwell* v.

Warren, 2 Black 599, 603, 17 L. Ed. 261, 262; *Green* v. *Neal*, 6 Pet. 291, 297-300, 8 L. ed. 402, 404-406. And we follow the state construction even though it may not agree with our own opinion. *Carroll County* v. *United States*, 18 Wall. 71, 82, 21 L. ed. 771, 775; *Shelby* v. *Guy*, 11 Wheat. 361, 367, 6 L. ed. 495, 496; *Tioga R. Co.* v. *Blossburg & C.R. Co.* 20 Wall. 137, 143, 22 L. ed. 331, 334."

Equally authoritative, and strongly opposed to the construction made by the Court of Appeals in the instant case, is this Court's holding in *First National Bank* v. *Fellows ex rel. Union Trust Co.*, 244 U.S. 416, 428, where the Court construed Section 11(k) of the Federal Reserve Act (38 Stat.. 251, 262, U.S.C., T. 12, Sec. 248(k)) under which the Federal Reserve Board was authorized to empower a National bank to act as a fiduciary "when not in contravention of State or local law." Those words, almost identical with the provision in the McFadden Act, were construed to make the exercise of the Federal Reserve Board's power dependent upon whether the **State law** expressly or impliedly **granted** similar power to State institutions—an inquiry which of necessity requires examination of the State statutes as construed and applied by the State courts. *Sneeden* v. *City of Marion* (C.A. 7) 64 F. 2d 721, 726, affirmed, *Marion* v. *Sneeden*, 291 U.S. 262, 269; *Granzow* v. *Village of Lyons, Illinois*, (C.A. 7) 69 F. 2d 83, 85; *LaParr* v. *City of Rockford, Illinois*, (C.A. 7) 100 F. 2d 564, 566-567; *Joseph* v. *Village of Downers Grove*, (C.A. 7) 104 F. 2d 974, 979; *Farley* v. *Albers*, (App. D.C.) 112 F. 2d 401, 403.

(4)

By imputing to the testator an intent derived solely from statutes enacted after his death, the Court of Appeals failed to follow the Illinois rule of decision and violated the Fifth Amendment.

The Court of Appeals in the instant case held, apparently in reliance upon *Chicago Title and Trust Company* v. *Zinser,* 264 Ill. 31, that the testator "was charged with knowledge not only that a consolidation might occur in Illinois under Illinois law but also that it might occur likewise by virtue of a federal statute *thereafter enacted.*" (R. 495). This is a ruling that the testator is charged with knowledge of the contents of statutes which came into existence many years after his death, that is:

(a) Section 11(k) of the Federal Reserve Act (38 Stat. 261, 262) as amended by Act of September 26, 1918 (40 Stat. 968, U. S. C., T. 12, Sec. 248(k)) which, *twelve years after testator's death,* for the first time authorized National banks to exercise trust powers in Illinois. See *People* v. *Brady,* 271 Ill. 100, 111, which prohibited the exercise of such powers in Illinois before that time.

(b) The McFadden Act of 1927 (44 Stat. 1225, U. S. C., T. 12, Sec. 34(a)), which, *twenty-one years after the testator's death,* for the first time authorized National banks to consolidate with State banks in Illinois. See *McRoberts* v. *Minier,* 270 Ill. App. 1, 10.

(c) The McFadden Act, as amended in 1933 (44 Stat. 1225, 48 Stat. 186, 190, U. S. C., T. 12, Sec. 34(a)) which, *twenty-seven years after the testator's death,* provided the First National Bank of Chicago in the instant case with authority to enter into the merger here involved.

Moreover, it was under the provisions of the McFadden Act of 1927, *enacted twenty-one years after testator's death,* that a statutory basis was first created for re-

spondent bank's claim that by virtue of the merger in 1933 it automatically succeeded to the trusteeship of Otto Young's trust, without securing an appointment by a Court of competent jurisdiction as required by the testator's will.

The questions which immediately present themselves under these circumstances are: Is it a violation of the due process clause of the Fourteenth Amendment for a State, through its legislature or its courts, to charge a testator with knowledge of the contents of statutes which, at the time of his death, were yet unconceived and might never be, especially where, at the time of execution of his will and at the time of his death, any provisions of his will which provided for succession to the trusteeship of his estate conformably to the provisions of the subsequently enacted statutes would have been illegal under the law of the State? If the Federal court enforces a supposed State rule of decision to such effect, does it thereby violate the Fifth Amendment?

Petitioners contend that the Illinois rule of decision in this regard is not as the Court of Appeals determined it to be. As would seem to be compelled by man's innate inability to peer into the future, the Illinois courts have never attributed powers of prophetic vision to a testator or to any one who conveys property irrevocably. The cardinal rule of will construction in Illinois being that the actual intent of a testator must govern unless contrary to public policy (*Boyd* v. *Strahan,* 36 Ill. 355, 359; *Orr* v. *Yates,* 209 Ill. 222, 299), it is not surprising to find that Illinois courts have departed from this salutary rule only to the extent of charging the testator with knowledge as to the contents of statutes which were **in actual existence at the time of his death.** *Smith* v. *Garber,* 286 Ill. 67, 71; *Carpenter* v.

Browning, 98 Ill. 282, 285; *Belfield* v. *Findlay,* 389 Ill. 526, 529.

The case of *Chicago Title & Trust Co.* v. *Zinser,* 264 Ill. 31, from which the Court of Appeals apparently derived its erroneous view, clearly does not stand for the proposition that a testator is charged with knowledge of statutes enacted long after his death. When the Illinois Supreme Court in that case (264 Ill., at pp. 35-36) stated that "Etta Nelson, in naming the Real Estate Title and Trust Company as executor and trustee, knew that . . . the statute authorized . . . the consolidation of the corporation with any other corporation then existing or that might thereafter be organized" and "therefore contemplated that . . . the Real Estate Title and Trust Company might be consolidated with some other corporation such as the Chicago Title and Trust Company . . .," the Court was referring to and construing a statute *existing when the will was made, as well as at the time of her death.* General Corporation Laws, Hurd's Ill. Rev. Stat. (1913 ed.) ch. 32, Sec. 50 and 56.

In relying upon the *Zinser* case to achieve the result expressed in its opinion in the instant case, it is manifest that the Court of Appeals grossly over-extended the authoritative value of the *Zinser* case, in disregard of the express limitation which the Illinois court itself imposed upon its own decision. In its opinion in the *Zinser* case the Illinois court said (264 Ill., at pp. 34-35):

> "*. . . what is here said is not to be understood as intimating any opinion concerning the effect of the purchase by one corporation of the property, stock and franchises of another, or the merger of one corporation into another or the absorption by one of the other, upon the question . . . whether a purchase, merger or absorption carries with it the right to act as executor or trustee.*" (Emphasis supplied.)

The reason for this self-imposed limitation is obvious. The holding in the *Zinser* case turned entirely upon the

language of, and meaning to be assigned to, *particular provisions* of the General Corporation laws in *existence* at the time the testatrix executed her will and at the time of her death. If the *Zinser* case, were intended to lay down a general rule of automatic succession to fiduciaryships under any type of unification, and without regard to the language of, and the meaning to be assigned to, the particular statute there involved, as it was interpreted by the Court of Appeals, there can be no rationalization of the restrictions explicitly imposed by the Illinois court upon the authoritative scope of its own decision. From this analysis, it may be seen that to regard the *Zinser* case as announcing a State rule of decision as to the consequences of a merger —particularly one which took place in the banking field, entirely outside the scope of the General Corporation laws there being considered, and which was entered into under the claimed authority of a statute not only created by another sovereign but also enacted many years after the testator's death—is to impose upon the *Zinser* case a meaning foreign to the circumstances under which it arose and in contradiction and defiance of its very words. Thus, petitioners contend that the Court of Appeals failed to follow Illinois law.

Petitioners contend, further, that even if the Illinois rule of decision were as held by the Court of Appeals, that court violated the Fifth Amendment by applying such a rule, since it is obvious that such rule would violate the due process clause of the Fourteenth Amendment. As seen from the case of *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 643-644, it is a violation of due process for a State to create unreasonable and arbitrary presumptions. It is submitted that nothing could be more unreasonable or arbitrary than to presume that the testator intended to do that which became lawfully possible for the first time many years after his death, under subsequently enacted statutes

of another sovereign, particularly where to so provide at the time of his death would have been illegal and contrary to the public policy of Illinois, as shown by the case of *People* v. *Brady*, 271 Ill. 100, 111.

(5)

Conclusion.

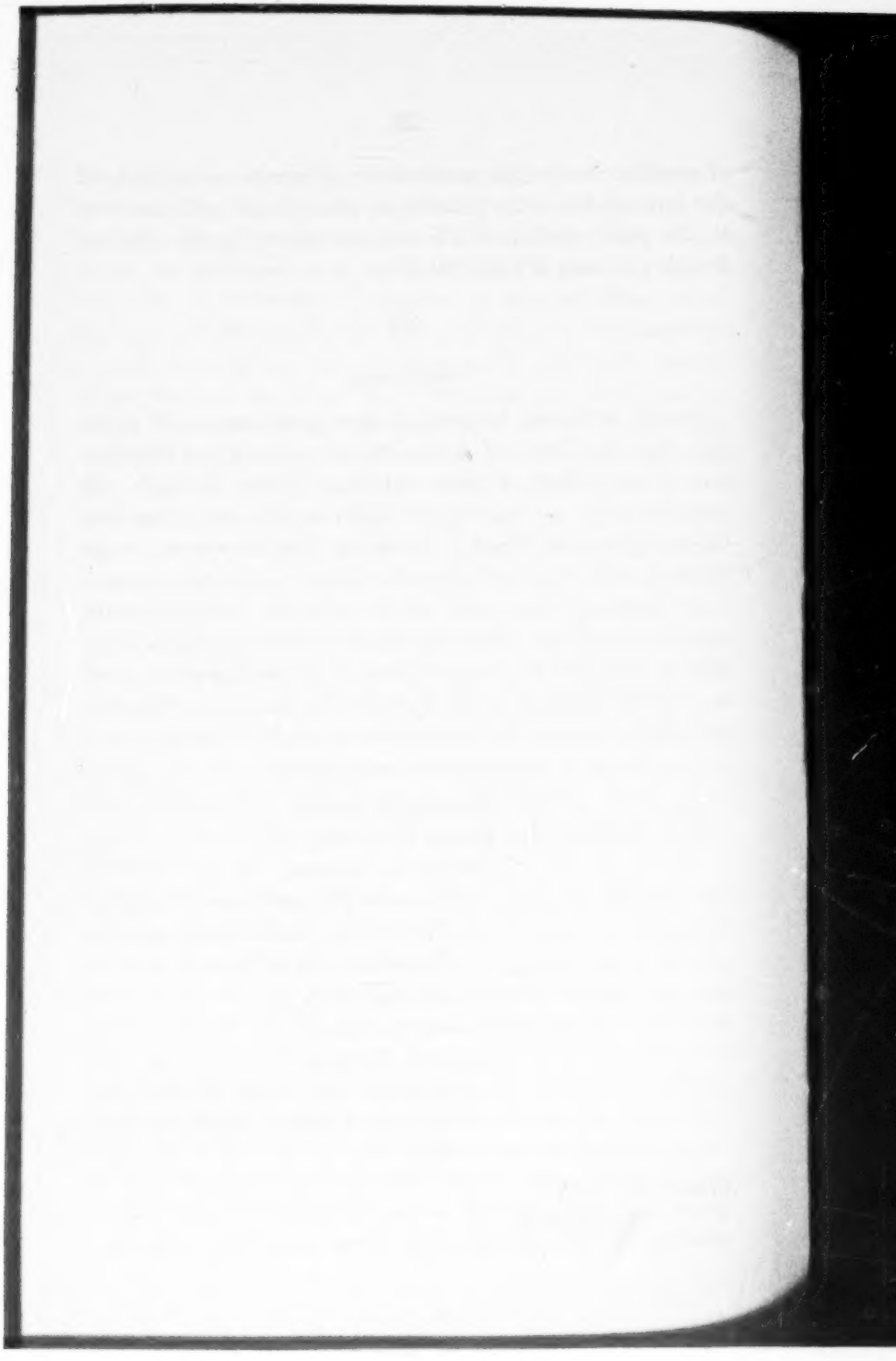
Should certiorari be granted here, petitioners will show, also, that the Court of Appeals misconstrued and failed to give proper effect to those portions of Otto Young's will specifying the circumstances under which, and providing the mechanics by which, a successor trustee was to be appointed, with the result that the Court of Appeals erroneously reversed that part of the District Court's decree holding the First Union Trust and Savings Bank, from 1929 to 1933, and respondent Bank, from 1933 to date, acted as successor trustee without authority under the will, and should account for that period as *de son tort* trustees.

Respectfully submitted,

CHARLES R. AIKEN,
HOMER F. CAREY,
VERNON R. LOUCKS,
Attorneys for petitioner Margaret DeKorwin, Individually and as Executrix, etc., Plaintiff.

THOMAS DODD HEALY,
HAROLD STICKLER,
IRVING A. GORDON,
Attorneys for John E. Sullivan, Special Trustee Pendente Lite, etc.

JOSEPH E. CASEY,
Of Counsel.



INDEX TO APPENDIX.

PAGE

(A) District Court opinion pertaining to succession by consolidation 1-6

(B) Court of Appeals opinion pertaining to succession by consolidation 7-14

(C) Pertinent provisions of the McFadden Act.....15-17

(D) Pertinent provisions of the Illinois Banking Act.18-29

(E) Excerpts from Bank's brief below pertaining to meaning and validity of the McFadden Act.....30-42

APPENDIX.

"A".

(District Court opinion pertaining to succession by consolidation. DeKorwin v. First Nat. Bank of Chicago, 84 F. Supp. 918, 934-937.)

The Succession in Trust.

Determination of plaintiff's second claim, that a successor trustee must be appointed by this court and that the First National Bank is accountable here as a trustee *de son tort,* necessarily turns upon a construction of the following provisions in the will (Secs. Fourth and Sixth):

> "I give, devise and bequeath all the rest, residue and remainder of my estate, of every kind and nature, to the first Trust and Savings Bank of Chicago, a corporation organized under the laws of the State of Illinois * * * as trustee * * * In the event that said trustee shall refuse to qualify or act, or further act, as trustee under this will, for any cause, a successor in trust, or a new trustee, may be appointed by any court of competent jurisdiction by and with the approval in writing of the appointee by not less than one-half (½) in number of my wife and children then living and such new trustee so appointed shall have all the powers given to the original trustee named herein."

Plaintiff states that "the testator's intention appears to be that upon any termination of the corporate existence of the First Trust and Savings Bank of Chicago, an Illinois corporation, through unification with another corporation by consolidation, merger, sale, or otherwise, there shall be a vacancy in the trust and that appointment of a successor trustee may be had only through resort to a court of equity in the manner provided for by the terms of his will." Under this construction it is urged that the First National Bank of Chicago has been administering Otto Young's trust estate without authority or right, and that the First Union Trust and Savings Bank before it was lacking in legal authorization to act. Plaintiff contends that a suc-

cessor trustee must be appointed to preserve the trust and that the unauthorized or constructive fiduciaries should be held accountable as trustees *de son tort*.

The First National Bank seeks to justify its action in taking over the trust on the ground there has never been a vacancy in the trust as a matter of law and because it was "the testator's intention that the trustee under the trust created by his will should be the trust organization constituting a part of or being directly affiliated with the First National Bank of Chicago." Its position in the latter respect is based largely on "the relationship between the testator and the First National Bank of Chicago and First Trust and Savings Bank."

It is difficult to perceive how the testator could have provided more plainly for the mode of appointing a successor trustee in the event his designated trustee ceased to act for any reason. He stated in unmistakable terms that any successor or new trustee must be appointed by a court of competent jurisdiction. The law appears firmly settled in Illinois that where a testator specifies in what manner a successor trustee is to be appointed, such a fiduciary can succeed to the trust in no other way. In *French v. Northern Trust Co.*, 197 Ill. 30, the Illinois Supreme Court stated the law on this subject to be (p. 38): "The author of a trust has the right to say in what manner vacancies shall be filled, and if he exercises that right they cannot be filled in any other way, unless there is a failure or refusal to fill them as directed or the trustee fails or refuses to act, in which case chancery will interpose to preserve the trust." To the same effect, see *In re Estate of Beckwith*, 258 Ill. App. 411, and cases there cited.

It may not be seriously claimed that Otto Young's original trustee is still acting, since it is undisputed that the corporate life of the First Trust and Savings Bank has long since been extinguished. Of necessity, therefore, the First National Bank in administering the trust is either a successor trustee or a new trustee. The same was true before it of the First Union Trust and Savings Bank. In either case, by the terms of the will, the successor bank could be acting properly only by the decree of a court of equity. It is admitted that no such judicial sanction was ever obtained, either for the First National Bank to act,

or in any way approving the trust administration by its predecessor, the First Union Trust and Savings Bank. The original trustee having ceased to act by reason of its legal death, and a successor or new trustee having never been lawfully appointed, the only conclusion reachable is that the trust is vacant. The McFadden Act does not apply to such a situation (*Ex Parte Worcester National Bank,* 279 U. S. 347).

Much has been said by both sides as to the status of the First National Bank had such provision as to appointment of a successor trustee not existed in the will of Otto Young. Whether, in the absence of such provision, the First National Bank would now be a duly constituted trustee is not before this court. The Bank relies heavily upon *Chicago Title & Trust Co.* v. *Zinser,* 264 Ill. 31, where the Court held the title company's position as executor could not be challenged in a suit by it for specific performance. After the testatrix executed her will naming another corporation as executor, the latter consolidated with the title company during her lifetime. Also, the title company had received its appointment under the will from the Probate Court. This circumstance, coupled with the fact that the consolidation occurred in the testatrix' lifetime under the then existing laws of the State, would make the Zinser decision inapplicable as an authority upon the effect of the consolidation of a State bank with a national bank in the instant case, quite apart from the special provision in the decedent's will. It should not be lost sight of that national banks were unable to act as testamentary fiduciaries until seven years after Otto Young's death, and that State banks could not consolidate with national banks until more than twenty years thereafter. *First National Bank* v. *Lindberg,* 293 Ill. App. 474, sheds no light upon the consolidation problem, even in the absence of such a provision in the will, because the case deals only with the inactive trusteeship of a trustee under a mortgage deed of trust. There the mortgagor was attacking the status of the plaintiff in foreclosure to escape his just obligation to bondholders and free his property from the lien of the mortgage.

The case now before this court requires it to determine the effect of the specific provisions quoted from the will of the decedent, and even if it be assumed that in its absence the First National Bank would have acquired a law-

ful status as trustee, it is impossible to reach that conclusion upon this record. That the named trustee ceased to exist and, therefore, could not act as trustee, is established beyond controversy, for the Zinser case upon which the Bank most relies holds, as do others, that bank consolidations destroy the constituent corporations. Thus the condition specified in the decedent's will occurred as early as 1929. Appointment of "a successor in trust" became necessary, and the mode of selection was specified by the testator to be through "any court of competent jurisdiction." This procedure has evidently not been resorted to by any beneficiary of the estate, either alone or in conjunction with others. It is impossible to conclude that "a successor in trust" under Otto Young's will could acquire a lawful status except through chancery appointment, for it is clear that the will contemplates this procedure in the events which have happened.

The Bank seeks to escape this conclusion by attempting to show through extrinsic circumstances that the First National Bank fell within the testator's intent in executing the successor trusteeship and, therefore, properly acts without judicial appointment. How Otto Young could have envisioned what was legally impossible of attainment until many years after his death is not explained, and no such purpose is intimated in his will. No amount of extrinsic evidence could have the effect of transforming a designation of the First Trust and Savings Bank into an appointment of the First National Bank. They were separate legal entities and existed and functioned as such. Each owed its origin to a different sovereignty and each was amenable to different laws. This court is compelled to hold that the First National Bank is acting without authority and as such is a trustee *de son tort*, and it is accountable as such during its administration of the trust and for its predecessor in like capacity from the date of the consolidation of the First Trust and Savings Bank with the Union Trust Company after which it became the First Union Trust and Savings Bank.

The First National Bank asserts further that the testator's language should be construed to mean that he did not specifically appoint as his trustee "the First Trust and Savings Bank of Chicago, a corporation organized under the laws of the State of Illinois," and that this court should

declare by way of judicial construction that it was "the testator's intention that the trustee under the trust created by his will should be the trust organization constituting a part of or being directly affiliated with the First National Bank of Chicago." On its face a ruling of this character would require the deletion of language showing clear testamentary intent and the substitution for such expunged provision of an entirely different direction nowhere indicated by the testator within his will. Such action by the court could not constitute a construction of the testamentary instrument but would amount to redrafting the will, a course the courts are strictly forbidden to follow. (*Gridley* v. *Gridley*, 399 Ill. 215, 229.) The Bank claims that its construction should be adopted "especially" because of "the relationship between the testator and the First National Bank of Chicago and First Trust and Savings Bank." Apparently that relationship was quite close, the testator having been a stockholder and director of both banks. If such a circumstance were properly to be considered in construing the testator's language, his intimate knowledge of the First National's affairs as stockholder and director might just as well be viewed in connection with the fact of his failure to mention such bank as indicative that he did not desire it to act as his trustee. In this connection there is force in the suggestion that under the Bank's construction a trustee has never been validly appointed since designation of a national bank at the time of the will would have been unlawful, but as this inquiry would require going behind the Circuit Court decree of 1922 it will not be further noticed.

Even in the light now cast by the First National Bank, the relationship between Otto Young and the two banks cannot help it (*Ickes* v. *Ickes*, 386 Ill. 19; *Cahill* v. *Michaels*, 391 Ill. 395; *Knight* v. *Knight*, 367 Ill. 646). In the *Ickes case* the Court said (p. 29): "Extrinsic evidence is never admissible for the purpose of varying the intent of the testator as expressed in the will." And in the *Knight case* the Court pointed out (p. 648) that if "the wording of the will is plain * * * the court can not change the language *even if the testator intended something different from what he said.*" However, assuming it was testator's wish that the First National Bank's trust organization or affiliate act as his trustee but that such a provision was omitted from the will merely

because he overlooked it, or that he had such a provision in his mind but simply neglected to express it, or that he would have so provided if he had only thought of it, the controlling decisions are uniform to the effect such speculation may not be indulged in upon construction by the court. In *Hull* v. *Adams,* 399 Ill. 347, the Illinois Court said (p. 352): "The question for the court to determine in every will construction case is not what the testator meant to say, but what he meant by what he did say." In *Glaser* v. *Chicago Title & Trust Co.,* 393 Ill. 447, the Court said (p. 463): "The Court cannot speculate or guess as to what provision he would have made had he not overlooked it." In *Gridley* v. *Gridley,* 399 Ill. 215, the Court said (p. 229): "When a condition has arisen in regard to a testator's estate which he had not taken into consideration and which he would probably have provided for if he had thought of it when making his will, the court cannot conjecture what provision he would have made unless that provision is contained in the words he has used in making his will. (*First Trust and Savings Bank* v. *Olson,* 353 Ill. 206.) The intention of the testator is not to be deduced from speculation as to what he would have done had he anticipated a change in the circumstances surrounding him at the time of the execution of the will, *since this would amount to making a will for him and not to interpreting the will he has made.*"

"B".

(Court of Appeals opinion pertaining to succession by consolidation. DeKorwin v. First Nat. Bank of Chicago, 179 F. 2d 347, 350-354.)

We have remaining for determination the question of the propriety of the District Court's judgment to the effect that the trusteeship created by Otto Young's will is vacant and that defendant National Bank and its predecessors should account *de son tort.*

Otto Young died November 30, 1906, testate, his will having been executed in 1905. Therein he named the First Trust and Savings Bank of Chicago as trustee of his residuary estate. This banking institution and been organized and was then being conducted in behalf of the stockholders and directors of the First National Bank. Young was one of its directors. The purpose of its organization was to provide the First National with a trust department, inasmuch as at that time the power of a national bank to administer trusts was questioned. Despite the fact that it was a separate corporate entity organized under the laws of Illinois, the First Trust & Savings was under the same ownership, control and management as the First National. Promptly upon Young's death, the First Trust entered upon the execution of its powers and duties as trustee under his will and continued so to do until February 11, 1929, when, in accord with Section 12 of the Illinois Banking Act, it consolidated with the Union Trust Company, another Illinois corporation endowed with statutory power to administer trusts. The consolidated corporation, First Union Trust and Savings Bank, continued to administer the trust. It, too, was owned, controlled and managed by the same persons who owned, controlled and managed the First National. On July 17, 1933, pursuant to the authority granted by the McFadden Act, 44 Stat. 1224-1226 as amended, 48 Stat. 190, the First Union was consolidated with the First National and thence afterward the consolidated bank, the present defendant, the First National, continued to perform the duties of the trustee imposed by the will of Otto Young exactly as had been done by the predecessor corporations.

Under this state of facts, plaintiff contended and the trial court found that when the First Trust was consolidated with the Union Trust Company, the office of trustee, under the terms of the will, thereby automatically became vacant and that the successor, from that time on, acted as trustee *de son tort.*

No one questions the validity of either of the consolidations or that all assets belonging to the trust estate did in fact pass in each instance to the successor consolidated corporation. It is undisputed also that the consolidation of July 17, 1933, under the McFadden Act, whereby the assets of the First Union Trust and Savings passed to the First National, was approved both by the Auditor of Public Accounts of the State of Illinois and the Comptroller of the Currency of the United States.

The pertinent clause in the will is as follows: "In the event that said trustee shall refuse to qualify or act, or further act, as trustee under this will, for any cause, a successor in trust, or a new trustee, may be appointed by any court of competent jurisdiction • • •." It is plaintiff's theory that at the time of the merger in 1929, the original trustee, thereby, as a matter of law, refused "to act" or to "further act" and that, therefore, under the terms of the will, no new authorized trustee could come into existence except by appointment by a court of competent jurisdiction. In other words, plaintiff can not complain, if the contingency mentioned in the will never occurred. That issue, in turn, becomes entirely one of whether, under the pertinent laws, the consolidations mentioned produced a contingency contemplated by the testator in his will, upon the happening of which the office of trustee became vacant. Stated otherwise, a court of equity is without power to appoint a trustee to fill a vacancy under this will if a vacancy never existed.

In an early Illinois decision, *Robertson* v. *City of Rockford,* 21 Ill. 451 (1859), the city had authority to lend money to a certain railroad but before the loan had been effectuated the railroad entered into a consolidation. The court held the suit of taxpayers to enjoin the proposed loan to the consolidated corporation to be without merit, saying: "When the legislature by the same act which conferred the power on the city to lend its credit to each of these com-

panies, also empowered them to consolidate their roads, it must have been intended that the power of the city might be exercised after such consolidation, as effectually as before that event occurred." The same thought persists throughout subsequent Illinois decisions and in the public policy reflected by various acts of the legislature governing corporations and banking and trust companies. Thus, the present Banking Act, enacted in 1887, Illinois Revised Stats. (1947), Chap. 16½, Sec. 12, is "Such change of name, place of business, increase or decrease of capital stock, increase or decrease of number of directors, managers or trustees, or consolidation of one corporation with another, shall not affect suits pending in which such corporation or corporations shall be parties; nor shall such changes affect causes of action, nor the rights of persons in any particular; nor shall suits brought against such corporation by its former name be abated for that cause."

A decision typical of the Illinois courts' reasoning in interpreting this statute is *Albers* v. *McNichols,* 301 Ill. App. 551. There, a nonassignable guaranty in favor of one of the constituent banks was held to pass automatically upon consolidation to the consolidated bank, the court saying: "The scheme is that the corporation which is merged with another should lose its identity *only so far as its separate existence is concerned* and that *it should be swallowed up in the other, and become* an *integral part thereof, carrying into the corporation* which survives all its rights, powers and assets. * * * The resulting bank is possessed of all the interests of the former banks * * *." (Emphasis supplied.) see also *Scheidel Coil Co.* v. *Rose,* 242 Ill. 484, and *Chicago Title & Trust Co.* v. *Doyle,* 259 Ill. 489. In the first of the two cases last cited the court said: "A new corporation comes into existence having all the property, rights, powers and franchises, and subject to all the duties and obligations of both the constitutent companies."

The essential, indeed, the decisive thought reflected by legislation and decisions of Illinois is that, though the separate legal existence of a merging corporation may terminate its corporate powers pass to the consolidated corporation, and its functions are continued in the new corporation of which it is a constituent component part. It is not surprising, therefore, to find the Supreme Court saying, in

Chicago Title & Trust Company v. *Zinser*, 264 Ill. 31, that where a corporate trustee named in a will is merged with another corporation, the consolidated corporation receives and retains all the property and functions of each of the original corporations which have become integral parts of the new corporation. There Etta Nelson had appointed the Real Estate Title and Trust Company executor of her will and, before her death, that company had been consolidated with the Chicago Title and Trust Company. Pursuant to and in accord with the provisions of the corporation statute of Illinois, which are to all intents and purposes, the same as those of the Banking Act, the consolidated corporation, as executor, sought to procure a decree of specific performance upon a contract belonging to the original executor. Defendant contended that the Chicago Title & Trust Company had no power or authority to act as the testamentary trustee. The court disposed of the contention by saying first: "By the consolidation of the Real Estate Title and Trust Company and the Chicago Title and Trust Company, the original corporations ceased to exist and the appellee, as the consolidated corporation, acquired and succeeded to all the faculties, property, rights and franchises of its component parts and became subject to all the duties, obligations and conditions imposed upon them. (*Robertson* v. *City of Rockford*, 21 Ill. 451; *Chicago, Rock Island Pac. RR Co.* v. *Moffitt*, 75 id. 524)." Then, after referring to the rule that a trustee may not delegate his authority, the court continued: "The rule, however, cannot be applied to the case of a corporation, because the element of trust in the judgment and discretion of an individual is entirely wanting. A corporation is without personality, and if it is selected as trustee or executor there can be no reliance upon individual discretion or even upon the continuance of the same administration. Etta Nelson, in naming the Real Estate Title and Trust Company as executor and trustee, knew that its directors, officers and stockholders might change from time to time, and that the statute authorized * * * consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that these changes might occur and that the Real Estate Title and Trust Company might be consolidated with some other corporation such as the Chicago Title and Trust Company,

and that it would thereby cease to exist and become a component part of a new corporation. A consolidation took place and a new corporation was created from the original corporations, with an enlarged capital stock and unimpaired franchises. The appellee was entitled to execute the trust, and the chancellor did not err in overruling the demurrer."

The underlying reason for this decision, obviously, is that every testator is presumed to know that changes in the structure of a corporate trustee may occur and to have contemplated the possibility of consolidation, change of name or other mechanical improvement or modification of the corporate structure. That a testator is bound by such presumption is in accord with the general doctrine that every citizen contracts and conveys property with the knowledge in mind that the government of the sovereignty under which he lives may, within its constitutional limits, authorize changes in the public policy, whether it be determination of the gold content of the dollar or of other matters growing out of the police power of the state or the constitutional power of the United States, in their respective fields. So, when Otto Young executed his will, he knew that the statute of Illinois had authorized consolidation of corporations authorized to administer trusts. Therefore, he contemplated that such consolidation might occur under that statute for, under the law, he was bound so to contemplate. When the original trust company merged with the second company in 1929, each of the merging companies became an integral part of the new corporation which succeeded to all the rights of and became bound to discharge all obligations imposed upon each of the integral component parts.

It is said that the *Zinser* case is distinguishable from this case. We think it can not be distinguished in underlying principle. True, there the consolidation took place before the decedent died, but, if the consolidated corporation was not a legal continuing existence of the corporate trustee actually named in the will, if it did not stand in its shoes, then the probate court had no authority to designate it as executor, for, under the statutes, that court may name as executor only the person nominated by the testator. If the testator has designated no executor or the one named

refuses or fails to act, the probate court can only appoint an administrator with the will annexed. Consequently, the act of the probate court, in designating the successor corporation as trustee, was a recognition of the continued existence of the merging corporation, so far as functions and obligations were concerned, in the new corporation as a part thereof. The provisions of the will in the *Zinser* case are not precisely the same as those in the present case, so far as naming a trustee is concerned, but the differences are not such as to distinguish the two cases in principle.

The significant thought, as we gather it from the Illinois authorities, is that, upon consolidation of banking corporations and trust companies, the merging corporations, though they cease to exist as individual entities, are merged into and become integral parts of the new corporation and that, though they therefore lack formal legal existence, for the purpose of performance of their trust duties and obligations, they remain alive, by permission of the legislative body, in a new corporate entity. In this we are corroborated by then Attorney General Kerner of the State of Illinois, in Illinois Attorney General Reports and Opinions 1934 p. 380. It follows that, inasmuch as the testator was presumed to know that consolidation might occur, he necessarily contemplated that it would occur and that, when consolidation did occur, he intended what the laws says, namely, that the functions of the merging corporations would pass to the new corporation. Therefore the contingency upon the happening of which the right of a chancellor to appoint a trustee has never occurred.

Thus far we have dealt only with the effect of the merger of 1929. We pass to the consolidation of the First Union with the First National in 1933, when, pursuant to the McFadden Act, Title 12, Section 34 (a) U.S.C.A., the former merged with the First National. This statute provides that any banking corporation under the laws of any state may be consolidated with national banking organizations located in the same city and that "* * * the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association *shall be deemed to be the same corporation as each of the con-*

stituent institutions." The statute provides further that "* * * such consolidated national banking association, by virtue of such consolidation and *without any order or other action on the part of any court or otherwise, shall hold and enjoy the same,* all rights of property, franchises, and interests, including appointments, designations, and nominations and all other *rights and interests as trustee,* executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estate of lunatics and in every other fiduciary capacity, *in the same manner* and to the *same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation.*" (Emphasis supplied.)

The only restriction is that the act shall not apply if the consolidation would contravene the laws of the state where the banks are located. Our attention has been directed to no laws of the state of Illinois of which it can be said that such a consolidation contravenes them. Indeed, Illinois had recognized the validity of consolidation of state and national banks prior to enactment of the McFadden Act. Thus, in *McRoberts* v. *Minier,* 270 Ill. App. 1, the court said: "The Banking Act of this State, Cahill's St. ch. 16a, grants to State banks the right to consolidate with each other and also with a national bank upon complying with certain conditions." And in *First National Bank* v. *Lindberg,* 293 Ill. App. 474 at 481, the court announced: "It does not appear from anything called to our attention that it was necessary to specifically authorize the consolidation of a State bank with a national bank to give effect to the powers and authorities conferred by the national act. Therefore, in the absence of a State statute prohibiting such consolidation, the national act applies and is the basis of the authority for the consolidation." The Attorney General of Illinois, in his opinions in 1927, said: "* * * by such consolidation the constituent corporations by operation of law cease to exist and the new corporation accedes to all the rights, property franchise and interest, including the right of succession as trustee, executor or in any other fiduciary capacity in the same manner and to the same extent as was held and enjoyed by the constituent banks." We conclude that there is no statute in Illinois which in any wise contravenes such consolidation.

The language of the Act is clear and explicit. Under it the right of the merging bank to act as trustee and its obligations as trustee, are continued in the new corporation "to the same extent and in the same manner" "as they were held and enjoyed by any constituent institution at the time of such consolidation." Thus, when Otto Young made his will, he was charged with the knowledge not only that a consolidation might occur in Illinois under Illinois law but also that it might occur likewise by virtue of a federal statute thereafter enacted. Having been charged with such notice, he is presumed to have contemplated that, in case of any such consolidation, the duties of the trustee under his will would inevitably pass, as functions of an integral part of the new corporation, to the consolidated corporation and continue in existence in it. We conclude that the court erred in finding that the First National is not the duly authorized qualified trustee under the will of Otto Young, within the testator's intention and contemplation.

That portion of the judgment declaring the trusteeship vacant, ordering the First National Bank and its predecessors to account as trustees *de son tort* and appointing "special trustees *pendente lite*" is reversed with directions to proceed in conformity with the views expressed in this opinion. In all other respects the judgment is affirmed. The costs of this appeal shall be taxed one-half to appellants and one-half to appellees.

"C".

(Pertinent provisions of the McFadden Act of 1927, as amended in 1933. Act of Feb. 25, 1927, 44 Stat. 1224-1226, as amended by Act of June 16, 1933, 48 Stat. 190-191, U. S. C., T. 12, Sec. 34a.)

Any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same state, county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such state bank if the laws of the state where the same is organized so require, at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting for four consecutive weeks in some newspaper of general circulation published in the place where the said association or bank is situated, and in the legal newspaper for the publication of legal notices or advertisements, if any such paper has been designated by the rules of a court in the county where such association or bank is situated, and if no newspaper is published in the place, then in a paper of general circulation published nearest thereto, unless such notice of meeting is waived in writing by all stockholders of any such association or bank, and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting, but any additional notice shall be given to the shareholders of such state bank which may be required by the laws of the state where the same is organized. The capital stock of such consolidated association shall not be less than that required under existing law for the organization of a national banking association in the place in which such consolidated association is located. Upon such a consolidation, or upon a con-

solidation of two or more national banking associations under section 1 of this Act (12:33), the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, exeeutor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation: Provided, however, That where any such constituent institution at the time of such consolidation was acting under appointment of any court as trustee, executor, administrator, registrar of stock and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics or in any other fiduciary capacity, the consolidated national banking association shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such constituent corporation prior to the consolidation, and nothing herein contained shall be construed to impair in any manner the right of any court to remove such a consolidated national banking association and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any such consolidated association be removed solely because of the fact that it is a national banking association. When such consolidation shall have been

effected and approved by the Comptroller any shareholder of either the association or of the State or district bank so consolidated, who has not voted for such consolidation, may give notice to the directors of the consolidated association within twenty days from the date of the certificate of approval of the Comptroller that he dissents from the plan of consolidation as adopted and approved, whereupon he shall be entitled to receive the value of the shares so held by him, to be ascertained by a committee of three persons, one to be selected by the shareholder, one by the directors of the consolidated association, and the third by the two so chosen; and in case the value so fixed shall not be satisfactory to such shareholder he may within five days after being notified of the appraisal appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and the consolidated association shall pay the expenses of reappraisal, and the value as ascertained by such appraisal or reappraisal shall be deemed to be a debt due and shall be forthwith paid to said shareholder by said consolidated association, and the shares so paid for shall be surrendered and, after due notice, sold at public auction within thirty days after the final appraisement provided for in this Act (section); and if the shares so sold at public auction shall be sold at a price greater than the final appraised value, the excess in such sale price shall be paid to the said shareholder; and the consolidated association shall have the right to purchase such shares at public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price as its board of directors by resolution may determine. The liquidation of such shares of stock in any state bank shall be determined in the manner prescribed by law of the state in such cases if such provision is made in the state law; otherwise as hereinbefore provided. No such consolidation shall be in contravention of the law of the state under which such bank is incorporated.

The words "state bank", "state banks", "bank", or "banks" as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of state laws.

"D".

(Pertinent Provisions of the Illinois Banking Act, "An Act To Revise The Law With Relation To Banks And Banking", Approved June 23, 1919, L. 1919, p. 224, Ratified By Vote Of The People November 2, 1920, As Amended By Act Approved June 4, 1929, L. 1929, p. 174, Ratified At State-Wide Referendum November 4, 1930, Smith Hurd Ill. Rev. Stat., 1933, Chap. 16½.)

2. Application—Permit.] § 2. When any association of persons, as hereinafter set forth, desire to avail themselves of the provisions of this Act, they shall apply to the Auditor of Public Accounts for permission to organize, stating their place of business, giving street address, town and county of the same, the amount of capital and surplus, the amount for which each share in the proposed organization is to be sold, and name under which they desire to organize and the time for which such association shall continue, which statement shall be under their hands and seals and acknowledged before some officer authorized by law to acknowledge deeds.

The application shall be signed by at least the number of persons specified and if the banking institution is to be located within a city, village or incorporated town, they shall all be residents of such municipality, as follows:

If not within any such municipality, or, if within such a municipality of 10,000 inhabitants or less, five persons;

If within such a municipality of more than 10,000 inhabitants and not more than 25,000 inhabitants, ten persons;

If within such a municipality of more than 25,000 inhabitants, and not more than 50,000 inhabitants, fifteen persons;

If within such a municipality of more than 50,000 inhabitants and not more than 100,000 inhabitants, twenty persons;

If within such a municipality of over 100,000, twenty-five persons, twenty of whom reside within three miles of proposed location of the banking institution.

Accompanying this application must be a statement made before some officer authorized by law to acknowledge deeds,

giving the net financial worth of each of the members of this association of persons and these financial statements shall be accompanied by at least three references as to personal character of each individual named therein. The Auditor shall examine said application and accompanying statement and shall investigate the truth of the statements contained therein and if it appears that the statements therein and the affidavits in connection therewith are true, and that the applicants are entitled to a permit to organize the Auditor shall issue to them a permit to organize, but no permit shall be issued hereunder to any corporation by the same name as any other corporation then operating under the laws of this State or of any law of the United States, or by a name so similar to the name of any other corporation then operating under the laws of this State, or of any law of the United States as in the opinion of the Auditor of Public Accounts will create confusion, and all associations formed under this Act shall have their capital stock divided into shares of not less than ten dollars ($10.00) each nor more than one hundred dollars ($100) each. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

3. Capital stock subscription—Election of directors.] § 3. As soon as may be after receipt of authorization, books of subscription to the capital stock may be opened, and when the capital stock shall have been fully subscribed for, a meeting of the subscribers to the stock of such association shall be called (each subscriber having had at least three days' notice) for determination of the number and election of directors to serve as managers for one year, and until their successors are elected. And no director shall be elected unless he shall have received votes representing at least a majority of the shares of the association; and the voting may be done by person, or by proxy, and at such election the subscribers or stockholders shall have the right to vote for the number of shares owned or subscribed by him for as many persons as there are directors to be elected, or to accumulate such shares and give one candidate as many votes as the number of directors multipled by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall deem proper.

4. Directors—Organization—False statements.] § 4. The directors so elected may proceed to organize by the election of one of their number as president, and may appoint such other officers as the by-laws may provide, and fix their salaries, to carry on the business of the bank or association and make by-laws (not inconsistent with this Act) for the government of the bank or association, and may employ necessary employees; and each director shall take and subscribe to an oath such as the Auditor shall prescribe of fealty to the bank or association of which he is director and that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such bank or association and will not knowingly violate or willingly permit to be violated any of the provisions of this Act; and that he is the owner in good faith and in his own right of the number of shares of stock required by this Act; and that the same is not hypothecated or in any way pledged as security for any loan or debt. Such oath subscribed by the director making it and certified by a proper officer authorized to administer oaths shall be immediately transmitted to the Auditor and shall be filed and preserved by him in his office. The directors shall cause to be kept suitable books of record of all the transactions of the bank or association and shall furnish to the Auditor lists of the stockholders and copies of any other records the Auditor may require. And there shall be an annual meeting of the stockholders for the election of directors each year on the first Monday in January unless some other date shall be fixed by the by-laws of the association. Any omission to elect directors shall not impair any of the rights and privileges of the association or of any person in any way interested but the existing directors shall hold office until their successors are elected and qualified as in such cases may be by law provided.

Every director of any bank or association organized under the provisions of this Act must own in his own right, free of any lien or encumbrance, shares of the capital stock of the bank or association of which he is a director, the aggregate par value of which shall not be less than one thousand dollars ($1,000), and stock certificates evidencing the capital stock of such bank or association of which he is a director, the aggregate par value of which shall not be less

than one thousand dollars ($1,000) issued in his name, shall be filed unendorsed and unassigned by him with the cashier of such bank or association during his term as director. Any director who ceases to be the owner of capital stock of such bank or association of the aggregate par value of one thousand dollars ($1,000), or becomes in any form disqualified, shall vacate his place as such director. The directors of any bank or association organized under the provisions of this Act, shall hold regular meetings at least once each month. A special meeting of the directors may be held as provided by the by-laws A special meeting of the directors may also be held upon call by the Auditor of Public Accounts or a bank examiner appointed under the provisions of this Act, upon twelve hours notice of such meeting by personal service of such notice, or by mailing said notice to each of the directors at his residence as shown by the books of the bank. There shall be present at each meeting a quorum, which shall consist of a majority of the directors.

Any officer, director or employee of any bank or association organized under the provisions of this Act, who shall wilfully and knowingly subscribe to or make or cause to be made any false statement with intent to deceive any person or persons authorized to examine into the affairs of such bank or association, upon conviction thereof, shall be punished by imprisonment of not less than one year or more than ten years in the penitentiary. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

5. Issuance, recording of certificate to commence business.] § 5. When the directors have organized, as provided in Section 4 of this Act, and the capital stock of such association shall have been all fully paid in and record of the same laid before the Auditor, together with an affidavit signed by each subscriber to the capital stock of such association stating that he is the owner of property in his own right, not including any stock of such association, in excess of all indebtedness of market value at least equal to the par amount fo stock subscribed for by him, and in the event any such person shall make a fraudulent affidavit he shall be guilty of perjury, the Auditor shall by himself or some competent person of his appointment, make a thorough

examination into the affairs of such association, and if satisfied the authorized capital has been paid in, and that the association has the full amount dedicated to the business, including a surplus which shall be not less than ten (10) per cent of the capital, and a reserve for operating expenses of at least five (5) per cent of the capital and when they pay into the Auditor's office the reasonable expenses of such examination, as determined by the Auditor, he shall give them a written or printed certificate under seal authorizing them to commence the business designated in Section 1 of this Act. And said certificate and the permit issued in accordance herewith, duly certified by said Auditor, shall be filed and recorded in the office for the recording of deeds in the county where such bank is organized, and the original or certified copy thereof shall be evidence in all courts of the existence and authority of said corporation to do business. Upon the recording of said certificate and permit said bank shall be deemed fully organized and may proceed to business.

The Auditor may, in his discretion, withhold the issuing of the said certificate, authorizing the commencement of business when he is not satisfied as to the personal character and standing of any officer or any director elected or appointed, in accordance with Sections 3 and 4 of this Act, or as to the truth of any statement contained in the affidavit of any subscriber, or when he has reason to believe that the bank is organized for any purpose other than contemplated by this Act, or that a commission or fee has been paid in connection with the sale of the stock of the bank. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

8. Examination by Auditor.] § 8. The Auditor, as often as he shall deem necessary or proper, and at least once in each year, shall appoint a suitable person or persons to make an examination of the affairs of every bank established under the provisions of this Act, which person shall not a stockholder or officer or employee of any bank which he may be directed to examine, and who shall have power to make a thorough examination into all the affairs of the bank, and in so doing to examine any of the officers or agents or employees thereof on oath, and shall make a full and detailed report of the condition of the bank to the

Auditor; and the bank shall not be subject to any other visitorial power than such as may be authorized by this Act, except such as are vested in the several courts of law and chancery. And there shall be paid to the Auditor of Public Accounts for each such examination, a fee of forty dollars ($40) and three cents (3c) additional for each one thousand $(1,000) of the total assets of the bank examined.

No bank or banking association organized under this Act, and no officer, director or employee thereof shall hereafter make any loan or grant any gratuity to any bank examiner appointed under the provisions of this Act. Any bank officer, director or employee violating this provision shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not more than five thousand dollars ($5,000) or by imprisonment in the county jail for not more than one year, or by both such fine and imprisonment. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

12. Proceedings relating to change of name, business, etc.] § 12. Whenever the board of directors, managers or trustees of any corporation having any banking powers existing by virtue of any general or special law of this State, or any corporation with banking powers hereafter organized under the provisions of this Act, may desire to change the name, to change the place of business, to increase or decrease or change the par value of the capital stock, to extend the duration of its charter, to increase or decrease the number of directors, managers or trustees, or to consolidate such corporation with any other corporation having banking powers which may hereafter exist, they may call a special meeting of the stockholders of such corporation for the purpose of submitting to a vote of such stockholders the question of such change of name, change of place of business, increase or decrease of number of directors, managers or trustees, increase or decrease or change the par value of capital stock, extension of duration of its charter, or consolidation with some other corporation, as the case may be: Provided, that in changing the name of any corporation under the provisions hereof, no name shall be assumed or adopted by any corporation organized under the laws of this State without the consent

of such other corporation, and that in no case shall the capital stock be diminished to the prejudice of the creditors of such corporation, or the number of directors, managers or trustees be reduced to less than three or increased to more than a number to be determined by the stockholders, nor shall the place of business of any bank or banking association located in any city, village or incorporated town, be changed to any other city, village or town, nor shall the place of business of any bank or banking association not located in an incorporated village, town or city, be changed to any village, town or city, or to any place more than five miles from its existing place of business.

Such special meeting shall be called by delivering personally, or by depositing in the post office at least thirty days before the time fixed for such meeting, a notice addressed to each stockholder at his residence as shown by the books of the bank, signed by a majority of said directors, managers or trustees, stating the time, place and object of such meeting. A general notice of the time, place and object of such meeting shall also be published, once each week, for three successive weeks in some newspaper printed in or nearest to the county in which the principal business office of said corporation is located. At any such meeting stockholders may vote in person or by proxy, each stockholder being entitled to one vote for each share of stock held by him, and votes representing two thirds of all stock of the corporation shall be necessary for the adoption of the proposed change of name, place of business, number of directors, managers or trustees, amount and par value of capital stock, extension of duration of charter or consolidation with some other company. At any regular meeting, or at the time and place specified in said notice of a special meeting called for that purpose, said propositions, or any of them, may be submitted to a vote, and if it shall appear that two thirds of all votes represented by the whole stock of such corporation are in favor of the propositions, or any of them, so submitted, a certificate thereof, verified by the affidavit of the president, or a vice-president, and under seal of the corporation, shall immediately be filed in the office of the Auditor, and if such change or changes shall be approved in writing by him, a like certificate, together with the Auditor's written approval, shall be filed forthwith for record in the office of the recorder of deeds of the

county where the principal business office of such corporation is located; whereupon the changes proposed and voted for at such meeting, as to name, place of business, increase or decrease or change of par value of capital stock, or number of directors, managers or trustees, extension of duration of charter, or consolidation with some other company, shall be and is hereby declared accomplished in accordance with the said vote of the stockholders.

And provided, further, that any corporation with banking powers availing itself of or accepting the benefits of, or formed under, this Act, and all corporations with banking powers existing by virtue of any special charter or general law of this State, shall be subject to the provisions and requirements of this Act in every particular, as if organized under this Act.

Such corporation shall, upon the filing of said certificate, in the recorder's office, cause to be published in some newspaper in or nearest the county in which their principal office is located a notice of such change of organization, once each week, for three successive weeks.

Such change of name, place of business, increase or decrease or change of par value of capital stock, increase or decrease of number of directors, managers or trustees, extension of duration of charter, or consolidation of one corporation with another, shall not affect suits pending in which such corporations or corporation shall be parties; nor shall such changes affect causes of action, nor the rights of persons in any particular; nor shall suits brought against such corporation by its former name be abated for that cause.

With the approval in writing of the Auditor of Public Accounts, which approval shall state that the proposed sale is, in his opinion, necessary for the protection of the depositors and other creditors, any corporation with banking powers may, by a vote of two-thirds of its directors and without a vote of its stockholders, sell all or any part of its assets to another corporation organized under the banking laws of this State or of the United States, provided such other corporation assumes in writing, all of the liabilities of said corporation as shown by its records, other than its liabilities to its stockholders as such.

Any stockholder objecting to any action of the corporation in leasing, exchanging or selling all of its corporate assets, or objecting to a merger or consolidation with another corporation (the corporation acquiring such assets by lease, exchange, sale, merger or consolidation being hereinafter referred to as the "acquiring corporation"), shall be obligated to sell and transfer to the acquiring corporation and the acquiring corporation shall become and be obligated to purchase such share or shares, together with all rights and interests thereby represented, including all all cash or securities or other benefits accruing to such share or shares from or by reason of the sale, lease, merger, or consolidation at a price equal to the fair value of such share or shares with interest on such fair value at the rate of five per cent per annum from the date such sale, lease, merger or consolidation was consummated. If such fair value and interest is not paid to such objecting stockholders by such acquiring corporation within thirty days after a mailing of notice thereof to the stockholder at his last known address as shown by the records of the corporation, of such sale, lease, merger, or consolidation, then such objecting stockholder may, within sixty days thereafter, file a petition in the Circuit Court of the county in which the principal office of the acquiring corporation is located, asking for a finding and determination of the fair value of such shares of stock. Upon the filing of such petition, the practice and procedure thereon shall be the same, as far as practicable, as that under the eminent domain laws of this State, but the court shall have full power and authority to do all things and enter all such orders as it may deem equitable and just for the purpose of preserving and protecting the rights of the parties of the proceeding during the pendency thereof. Such fair values shall be ascertained and determined as of the date of the consummation of such sale, lease, merger or consolidation, and without regard to any depreciation or appreciation because of or on account of such sale, lease, merger or consolidation.

The Court shall enter judgment against such acquiring corporation for the amount of such fair value, and interest thereon, which judgment may be collected as other judgments at law. Upon the payment of such judgment such stockholder shall cease to have any interest in such stock

or in the property of the corporation. Such stock may be held and disposed of by the corporation as it shall see fit.

Unless such objecting stockholder shall file such petition within the time herein limited, such stockhodler and those claiming under him shall be conclusively presumed to have authorized, approved and ratified such sale, lease, merger or consolidation. If, at the expiration of thirty days from the time of the consummation of such sale, lease, merger or consolidation, the person in whose name such share or shares shall stand, shall not be living, or shall be under disability, his executor, administrator, guardian or conservator as the case may be, shall be entitled to file such petition within ninety days after mailing of a notice thereof to the stockholder at his last known address as shown by the records of the corporation, of the consummation of such sale, lease, merger or consolidation. [As amended by act approved June 4, 1929. L. 1929, p. 174; ratified at Statewide referendum, Nov. 4, 1930.]

13. Records of change to be filed.] § 13. Before the Auditor shall approve any such proposed consolidation he shall require to be filed with him a complete record of the proceedings of such consolidation, a list of stockholders, the agreement or articles of consolidation approved by the stockholders, which shall include the amount of capital and surplus of the consolidated corporation, the plan of business, name and time for which such consolidated corporation shall continue, which shall comply with the requirements of this Act as to application for and organization in the case of a new association, a detailed financial statement showing the assets and liabilities of such proposed consolidation and such other records as he may deem necessary, verified by the affidavit of one or more of the officers of each consolidating corporations, and shall satisfy himself that said records and list are true and complete and that said financial statement is true and that a sufficient amount is dedicated to the business of such proposed consolidation.

The Auditor shall also require each director of such corporation to take and subscribe an oath of fealty as provided by Section 4 of this Act.

In the even any person shall make a fraudulent affidavit or oath he shall be deemed guilty of perjury.

The Auditor may, by himself, or some competent person of his appointment, make an examination into the affairs of such corporation, the expenses of which examination as determined by the Auditor, shall be paid by said corporation. [As amended by act approved June 4, 1929, L. 1929, p. 174; ratified at State-wide referendum, Nov. 4, 1930.]

15. Proceeding for dissolution—Fees.] § 15. Any association organized under this Act or any corporation with banking powers organized in pursuance of any general or special law of this State, or any consolidated corporation with banking powers as provided for by this Act, on depositing with the Auditor an amount of money equal to the whole amount of debts and demands against it, including the expenses of this proceeding, or upon making a contract in writing, approved by the Auditor, by which another bank or banking association incorporated under the laws of this State or of the United States assumes the whole amount of debts and demands against it, an executed copy of which contract shall be deposited with the Auditor, may determine its affairs, distribute its assets among its stockholders, resign its charter or certificate of incorporation, and close up its business, by a resolution passed at a meeting of its stockholders called for such purpose. The Auditor shall cause a copy of such resolution to be published in some newspaper published in the city or village where such bank or corporation is located; or if no newspaper shall there be published, then in the newspaper nearest to such city or village, and the Auditor shall in such publication also give notice that the notes and demands against such bank or corporation will be redeemed by him, or by the bank or banking association which has assumed the debts and demands against such bank or corporation, and if any outstanding notes or other demands are not presented in one year, such bank may deposit with the Auitor or elsewhere, under his direction, and subject to his order, on interest a sum sufficient to meet such outstanding demands, which when presented to the Auditor, shall be paid by him out of such sum and after six years from the day on which the publication of the dissolution was first made, the Auditor shall return to the stockholders, to be among them distributed pro rata, the remainder of any sum so deposited.

The Auditor shall be entitled to two per cent of all money deposited with and paid out by him under the provisions of this section, where the amount so paid, on account of any one bank or corporation, shall not exceed five thousand dollars, and one per cent, after that. [As amended by act approved June 4, 1929, L. 1929, p. 174; ratified at Statewide referendum, Nov. 4, 1930.]

"E".

(Excerpts pertinent to meaning and validity of the McFadden Act from briefs filed in the Court of Appeals by the respondent Bank, certified copies of which have been filed in these proceedings in this Court.)

Opening Brief of First National Bank.

On February 11, 1929, the First Trust and Savings Bank, pursuant to the provisions of Section 12 of the Illinois Banking Act, consolidated with the Union Trust Company, another Illinois banking corporation having power to administer trusts . . . on July 17, 1933, pursuant to the authority granted by the McFadden Act, 44 Stat. 1224-1226, as amended, 48 Stat. 190, the First Union was consolidated with the First National Bank which then clearly had power to execute trusts. After each consolidation, the consolidated bank continued to administer the trust created by the will of Otto Young on exactly the same basis as before. . . . The District Court held (1) that plaintiff was a devisee of an heir of a vested remainderman and, therefore, had standing to maintain this suit, and (2) that the trusteeship was vacant and defendant bank should be required to account as a trustee *de son tort* for all losses and fees since 1929. (Pp. 4-5.)

Because of the great importance of the consolidation issue to the defendant First National, to many other Illinois banks, and to the Bar generally, the Court is respectfully and earnestly urged to rule on this question whether or not it concludes that the interests given to Otto Young's grandchildren are contingent. The District Court's ruling on the effect of the consolidations involved in this case is so completely at war with the uniform practice of banking institutions in Illinois, and the law as it has been understood by both the lower and appellate courts of Illinois that its effect, if ultimately sustained, on many years of administration of thousands of Illinois trusts, can not possibly be foreseen. (Pp. 6-7.)

It is true that in both cases (*Scheidel Coil Co.* v. *Rose*, 242 Ill. 484; *Chicago Title & Trust Co.* v. *Doyle*, 259 Ill.

489), in order to determine whether a consolidated corporation should pay fees to the Secretary of State as a new corporation, the Court held that the legal existence of the old corporations had terminated. But it is important to note that in neither opinion did the Court make any suggestion that the existence or nonexistence of the constituent corporation should affect in any respect the transfer of rights to the new company. The general rule that all *rights* pass to the new corporation was reaffirmed by these decisions. Accepting the general rule that all rights and duties possessed by the original corporations pass by virtue of a consolidation to the new corporation, the question which remains is whether fiduciary rights and duties are excepted from that general rule. In passing, it may be noted that the fact that the technical existence of the old corporation terminates upon consolidation has no bearing on that question. (Pp. 28-29.)

The (Illinois) Supreme Court took note of the *Scheidel Coil Co.* and *Doyle* cases and recognized that the Real Estate Title and Trust Company, as such, went out of existence upon consolidation. . . . Next, the Court restated the general rule as to the consequences of the consolidation. "By the consolidation of the Real Estate Title and Trust Company and the Chicago Title and Trust Company, the original corporations ceased to exist. . . ." (Pp. 31-32.)

There is, of course, no reason why a testator may not express a contrary intent. He could provide, for example, that a change of name of the corporate trustee would create a vacancy and require the appointment of a new trustee. (P. 36.)

Under the clear and unambiguous language of the federal statute, there can be no doubt, since in Illinois this "national act is the basis of the authority for the consolidation" of the First Union Trust with the First National, that trusts held by the First Union Trust passed to the First National in 1933. (P. 51.)

The fact that the McFadden Act was enacted after the death of Otto Young is, of course, of no significance. The Act as amended in 1933 was passed prior to the consolidation of the First Union and the First National and expressly provides for the continuation of trusteeships in the consolidated bank. Moreover, under the rule of the *Zinser*

case it does not matter whether Otto Young ever actually contemplated that this particular consolidated bank would execute the trust established under his will. The *Zinser* decision did not rest on proof of Etta Nelson's actual intent with respect to the consolidated corporation. No showing as to her *actual intent* was made in that case. Instead, because she was presumed to have contemplated the possibility of a lawful consolidation in naming a corporation, she was likewise *presumed to have intended* also to appoint any corporation of which that named trustee might become a component part through consolidation. The First National Bank falls within the scope of Otto Young's *presumed intent* whether or not he ever actually realized that that particular bank might consolidate with the First Union Trust. (Pp. 53-54.)

Moreover, the point upon which the court below entirely relied in holding the trust vacant has no application to the instant consolidation under the McFadden Act. The corporate life of the constituent corporations is not extinguished by such a consolidation. By an amendment of June 16, 1933 to the McFadden Act, it is provided that upon consolidation of a state bank with a national bank "the corporate existence" of the state bank and the national bank are "merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions." (P. 54.)

On the consolidation of the First Union Trust and Savings Bank with The First National Bank of Chicago on July 17, 1933, the First Union Trust and Savings Bank was consolidated with and "merged into" The First National Bank of Chicago. Under this consolidation, therefore, the corporate existence of the First Union Trust and Savings Bank was continued in the First National Bank of Chicago, and the fiduciary powers enjoyed by the First Union Trust and Savings Bank were undisturbed although exercised by The First National as the *alter ego* of its constituent corporation. (P. 54.)

The First Union Trust and Savings Bank, having been lawfully vested with all the rights and powers of trustee under the Otto Young will, *a fortiori,* such powers were not divested by consolidation with The First National bank

under the provisions of the McFadden Act. Neither Illinois statutory law nor decisions of its courts of appeal can be pointed to which would be contravened by the consolidation of a state and national bank under the provisions of the McFadden Act. (P. 55.)

Reply Brief of First National Bank.

In its original brief and argument, The First National Bank of Chicago stressed the importance of the District Court's ruling on the consolidation issue. The Bank then assumed that its power to convey property and otherwise to enter into binding contracts had not been called into question in this cause, and it further assumed that no question had been raised as to the validity of either of the consolidations.

Plaintiff now takes the position that neither assumption was justified. She argues here that there has been no trustee with power to deal with the trust assets since the 1929 consolidation. Therefore, in plaintiff's view, every contract or conveyance made by an Illinois corporate trustee subsequent to a comparable consolidation is either void or at least voidable. And it now also appears *for the first time* that the validity of the 1933 consolidation is challenged. Plaintiff adopts the argument of Mr. Sullivan who contends that The First National Bank, and presumably every other national bank which has consolidated with an Illinois Bank, "is not, and never was, a corporation, either *dejure* or *de facto.*" Thus does plaintiff ask this Court to sow the seeds of a ripe litigious harvest.

The consolidation issue is, indeed, an important issue which should be analyzed carefully before this Court. Properly analyzed, there can be no doubt that the issue should be resolved in favor of the Bank. Doubts can arise only from confusion of the questions presented by this issue. Consequently the stategy which should give plaintiff her only chance of success is a strategy designed to obfuscate and to confuse. (Pp. 2-3.)

It seems desirable first to identify the questions which the Court must face, and then to discuss the arguments bearing on each question separately.

These five questions are:

1. What is the effect of the *Zinser* case on the *appointment* of a corporate trustee?

2. Having in mind the answer to that question, what is the meaning of the successorship clause in Otto Young's will?

3. Was the 1933 consolidation valid?

4. What was the effect of the 1933 consolidation?

5. What is the measure of liability of an Illinois trustee *de son tort?*

The first two questions relate primarily to the 1929 consolidation. Unless the trusteeship survived this consolidation, there is no occasion for giving any consideration to the 1933 consolidation or to any Federal statute.

The third and fourth questions relate to the 1933 consolidation. In the Bank's original brief it was stated that the effect of the 1929 consolidation necessarily determines the *effect* of the 1933 consolidation. Plaintiff has apparently realized the accuracy of this statement because now she has shifted her attack to challenge the *validity* of the 1933 consolidation. If the first three questions are answered favorably to the Bank, it necessarily follows that the fourth question, *i. e.*, the *effect* of the 1933 consolidation, must also be answered favorably to the Bank.

The fifth question is of course not reached unless the Court concludes that there is a vacancy in the trust.

These five questions will be discussed in order. (Pp. 5.6.)

Absent either contravening or enabling state legislation, the McFadden Act, which has been held constitutional by the United States Supreme Court, authorizes the consolidation of State Bank with National Banks.

In 1927 the Congress enacted the McFadden Act to authorize the consolidation of state and national banks. (44 Stat. 1224-1226.) In that statute it is stated that:

> "No such consolidation shall be in contravention of the law of the State under which such bank is incorporated." 44 Stat. 1226; 12 U. S. C. 34a.

But Congress did not provide that the State must pass enabling legislation before the Federal Statute is operative.

In terms the McFadden Act authorizes the consolidation of state and national banks so long as the consolidation is not in contravention of state law. Assuming for the present, therefore, that Illinois has expressed neither an affirmative nor a negative policy with respect to consolidations under the McFadden Act, it is clear that the Act should be construed to apply in Illinois. It has been so construed repeatedly in other states. See e. g. *Ex parte Worcester National Bank,* 162 N. E. 217 (Mass.); *First National Bank of Chattanooga* v. *Chapman Co.,* 22 S. W. 2d 245 (Tenn.); *Hofheimer* v. *Seaboard National Bank,* 153 S. E. 656, 658 (Va.); *Adams* v. *Atlantic National Bank,* 155 So. 648 (Fla.). (Pp. 22-23.)

The 1933 consolidation was therefore valid unless plaintiff can demonstrate one of two things: (1) that the *Worcester Bank* case has been overruled, or (2) that the consolidation was prohibited by Illinois law. The latter point will be deferred momentarily, and the former point needs but brief mention.

Neither Mr. Sullivan nor plaintiff even cites the United States Supreme Court decision in the *Worcester Bank* case, so it is manifest that they cannot be arguing that it has been overruled. Apparently, however, the guardian *ad litem* does take the position that the United States Supreme Court was in error in the *Worcester Bank* decision although he never expressly states that the case has been overruled. Instead, he tries to convey that impression by quoting certain portions of the opinion in *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315.

The short answer to that oblique argument is that the *Hopkins* case does not purport to overrule the *Worcester Bank* case, and in fact does not even cite it except once in connection with a question of statutory construction. (See 296 U. S., at 334.) Nor is it likely that the unanimous opinion in the *Hopkins* case in 1935 was intended to overrule the unanimous decision rendered only six years earlier in the *Worcester Bank* case. The six justices who participated in both decisions (Van Devanter, McReynolds, Brandeis, Sutherland, Butler, and Stone, JJ.) never indicated any such irresolution in their other work on the Court.

In the *Hopkins* case the Supreme Court merely held that the Federal Home Owners' Loan Act of 1933 was uncon-

stitutional to the extent that it purported to authorize the conversion of state building and loan association into federal associations *in contravention of the laws of the State of their creation.* The United States Supreme Court thus sustained the challenge to the Act by the Wisconsin State Banking Commission, which was able to demonstrate that a conflict existed between the State and Federal laws. No question as to the power of Congress in the absence of such a conflict was before the Court, and the Court made no attempt to overrule the *Worcester Bank* holding.

Absent contravening state law, state banks may consolidate with national banks pursuant to the Federal consolidation statute just as state banks may convert to national banks pursuant to the Federal conversion statute, 12 U. S. C. 35. No Illinois statutory authority was needed to accomplish either the conversion of Illinois banks to national banks or the consolidation of Illinois banks with national banks. See Illinois Attorney General's Report and Opinions, 1927, 316, 319; *Id.*, 1934, 378.

Assuming that Illinois is silent on the question of the legality of a consolidation of a state and national bank, it is therefore clear that the 1933 consolidation was valid. (Pp. 24-26.)

The clearest evidence, however, is afforded by the square holding of the Illinois Appellate Court in *First National Bank* v. *Lindberg,* 293 Ill. App. 474 (1938), a case which Mr. Sullivan agrees was "properly decided". There the Court held that since there was statutory authority for the 1933 consolidation between the First Union Trust and the First National (the identical consolidation involved in the case at bar), the validity of that consolidation could only be questioned by the Attorney General of Illinois.

In that case the unsuccessful appellant relied on the identical authorities relied on by plaintiff, *et al.* in the case at bar. Citing *American Loan & Trust Co.* v. *Minnesota & N. W. R. Co.,* 157 Ill. 641, and *Gunggoll* v. *Outer Drive Athletic Club,* 349 Ill. 406, the appellant in the *Lindberg* case properly contended (1) that a consolidation is void if not authorized by any statute, and (2) that a void consolidation may be attacked collaterally. If, however, there is statutory authority for the consolidation, it has at least *de facto* validity and is subject to attack only by the At-

torney General of the State. *Fiedler* v. *Eckfeldt*, 335 Ill. 11; *Hudson* v. *Green Hill Seminary Corp.*, 113 Ill. 618. For the appellant to prevail in the *Lindberg* case it was therefore essential for him to demonstrate that there was no statutory authority for the 1933 consolidation. He made the same argument made by plaintiff *et al.* here, relying primarily on *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315. But the Illinois Appellate Court rejected the argument because there was statutory authority for the 1933 consolidation. It flatly stated (293 Ill. App. at 481):

> "It does not appear from anything called to our attention that it was necessary to specifically authorize the consolidation of a State bank with a national bank to give effect to the powers and authorities conferred by the national act. Therefore, in the absence of a State statute prohibiting such consolidation, the national act applies and is the basis of the authority for the consolidation."

This is a statement of the ground of the Appellate Court's decision and that ground is dispositive of the issue belatedly raised by plaintiff, *et al.* on this appeal. For the Court could not have denied the appellant in the *Lindberg* case the right to attack the validity of the consolidation unless it found a statutory basis for the consolidation; if the McFadden Act had not provided the necessary statutory authority, the consolidation would have been completely void and therefore subject to collateral attack.

The Illinois Appellate Court has therefore squarely held that the McFadden Act authorized the 1933 consolidation attacked by plaintiff, *et al.* in the case at bar. (Pp. 27-28.)

Moreover it is appropriate to mention the fact that the administrative interpretation of the statute is uniformly in accord with the judicial interpretation found in the *Lindberg* case. The United States Comptrollers of the Currency and the Auditors of Public Accounts of the State of Illinois, the highest fiscal officers directly concerned with this problem, have given their express approval to some 23 consolidations of Illinois banks with national banks. The opinion of these experts, reaffirmed as recently as 1946, points up the absurdity of plaintiff's contention that none of those national banks has any legal existence "either *de jure* or *de facto*".

The Bank has consistently referred to the 1933 consolidation as a "consolidation". Plaintiff *et al.* are very careful never to refer to this "unification" as a "consolidation"; they criticize the Bank for miscalling the transaction a consolidation and for relying upon statutes and authorities dealing solely with consolidations. One of those statutes dealing solely with consolidations is the McFadden Act. In that statute Congress used the term "consolidation" in authorizing the very transaction under discussion. Despite the fact that one of the consequences of the 1933 consolidation is different from that attending Professor Bogert's theoretical definition of "consolidation", the Bank feels that it is more appropriate to use the statutory term than any of the alternatives suggested by plaintiff.

It has already been demonstated above that this statute authorized the 1933 consolidation if it was not in contravention of Illinois law, and further that the Illinois Appellate Court has already held that the McFadden Act provided the statutory authority for this very consolidation. *First National Bank* v. *Lindberg,* 293 Ill. App. 474. Nevertheless Mr. Sullivan and the guardian *ad litem* have made a series of specious arguments designed to prove that the 1933 consolidation was in contravention of Illinois law. These arguments will be refuted separately even though the *Lindberg* case is a complete answer to all of them.

Mr. Sullivan first argues that since no error has been assigned with respect to the statement of the Court below that on "July 17, 1933, the First Union Trust and Savings Bank was merged with the First National Bank of Chicago", that statement cannot be controverted on this appeal. Since the validity of the consolidation under the McFadden Act was not chalenged below, but only the effect of compliance with that Act was in question, it was immaterial to defendants what terms the trial court used in referring to the 1933 consolidation. The statute itself is controlling and reference to the Act shows that it was a consolidation, which in certain respects is given the incidents generally ascribed to a merger.

Mr. Sullivan's principal argument is that the 1933 consolidation was really an attempted merger which was void because mergers of banking corporations are not authorized (and hence are forbidden) by Illinois statute.

There are at least three complete answers to this argument. First, Illinois statutory authority for the so-called merger was unnecessary because the Federal statute afforded the necessary authority. In the *Lindberg* case the Illinois Appellate Court squarely held that the McFadden Act "applies and is the basis of the authority for the consolidation." 293 Ill. App. 474, 481. The case of *American Loan and Trust Co.* v. *Minnesota & N. W. R. Co.*, 157 Ill. 641, on which Mr. Sullivan places his primary reliance, is completely inapposite because the Court was there dealing with a situation where "there was *no statute* under which the consolidation could have been made * * *." 157 Ill. at 653. Similarly, the decision in *McRoberts* v. *Minier*, 270 Ill. App. 1, was grounded on the fact that *Federal* authorization for the attempted consolidation was lacking. Here there was a Federal statute which authorized the 1933 consolidation.

The second complete answer to Mr. Sullivan's "merger" argument is apparent from the very authorities which he quotes on pages 14 and 15 of his brief. These cases make it clear that the name given to the transaction is not important. In *Chicago Title & Trust Co.* v. *Doyle*, 259 Ill. 489, 496, an attempted merger was held to be a consolidation because the controlling statute authorized consolidation but not merger. In the instant case the McFadden Act, as amended in 1933, authorized a consolidation which had one consequence normally associated with a merger. Since the statute is controlling, and since the First Union and the First National admittedly complied with the McFadden Act, it follows that the parties accomplished the type of consolidation authorized by that Act.

For the third answer to the argument it may be assumed *arguendo* that the McFadden Act, as amended in 1933, is inapplicable in Illinois to the extent that it provides for the continuation of the corporate existence of the constituent banks in the consolidated bank. But this consequence of the consolidation does not affect the validity of the consolidation itself. The provision for this particular consequence did not appear in the statute as enacted in 1927 (44 Stat. 1224-1226). It first appeared in the 1933 amendment (48 Stat. 190). Under Mr. Sullivan's reasoning, therefore, consolidations effected between 1927 and 1933 were valid, but those after 1933 were void. That is nonsense.

The fact that the 1933 amendment provides for the continuation of the corporate existence of the constituent banks as one consequence of the consolidation has no bearing on the question of the validity of the consolidation itself. The most that Mr. Sullivan's argument can possibly prove is that the 1933 consolidation was the type of consolidation authorized by the Illinois Banking Act rather than a merger. (Pp. 29-33.)

It may be true, as the guardian *ad litem* points out that four other states passed statutes expressly authorizing state banks to consolidate with national banks because it was assumed that such enabling legislation was necessary in those states. If the action of the legislatures of such states is explained on the ground of necessity, the inaction of the legislatures in Illinois and other states can be similarly explained on the ground that additional legislation in these states was *not* necessary. See e. g. *Ex parte Worcester National Bank,* 162 N. E. 217 (Mass.); *First National Bank of Chattanooga* v. *Chapman Co.,* 22 S. W. 2d 245 (Tenn.); *Hofheimer* v. *Seaboard National Bank,* 153 S. E. 656, 658 (Ga.); and *Adams* v. *Atlantic National Bank,* 155 So. 648 (Fla.). (Pp. 37-38.)

As stated in the Bank's principal brief, the McFadden Act expressly provides that trusts held by a state bank prior to consolidation with a national bank shall be executed by the national bank after the consolidation. Since it was held in the *Lindberg* case that the McFadden Act afforded the statutory authority for the 1933 consolidation, it is clear that the First National Bank became trustee of Otto Young's trust estate upon consolidation with the First Union.

Plaintiff *et al.* have tried to avoid this conclusion by making two inconsistent arguments. First, they argue repeatedly that the 1933 consolidation was really a merger, and therefore that the *Zinser* case, which in terms deals only with consolidations, is inapplicable. We agree that the 1933 consolidation had, as one of its consequences, the merging and continuation of the corporate existence of two banks in the resultant bank. But if it follows that the 1933 transaction was therefore a merger within the meaning of the *Zinser* opinion, there is no need for reliance on the *Zinser* case. For if there is no corporate death, there is

certainly no basis for the argument that the consolidation created a vacancy.

Secondly, plaintiff *et al.* argue that the McFadden Act is inapplicable in Illinois because the provision for continuation of the corporate life of the constituent banks in their single successor is contrary to Illinois law. It is true that corporate existence is terminated by a consolidation under the Illinois Banking Act. But Illinois has never expressed any policy against mergers or against consolidations which have as one consequence the merging of the corporate existence of two banks. On the contrary, the Illinois Appellate Court has squarely held that such a consolidation under the McFadden Act is authorized in Illinois. The mere fact that Illinois has not authorized the merger of two Illinois Banks certainly establishes no public policy against mergers under a Federal statute which is operative in Illinois.

But even assuming, *arguendo,* that the merger language in the McFadden Act is inapplicable in Illinois, the statute still provides expressly for the automatic succession of the trusteeship. Even if the words dealing with continuation of corporate existence were eliminated from the statute, it would still provide that the "* * * consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights * * * as trustee * * * to the same extent as such rights * * * were held or enjoyed by any such constituent institution at the time of such consolidation." 48 Stat. 190.

The argument that the rule of the *Zinser* case has no application to the 1933 consolidation because the McFadden Act was enacted after the death of Otto Young repeats an error made throughout the briefs of plaintiff *et al.* That error is the failure to appreciate that the *Zinser* decision was predicated not on the testatrix' actual intent, but rather on her presumed intent. The Illinois Supreme Court did not hold that Etta Nelson actually contemplated the consolidation of two particular corporations. On the contrary, since no evidence as to her actual intent was adduced, the Court held as a matter of law that "Etta Nelson, in naming the Real Estate Title and Trust Company as executor and trustee, knew * * * that the statute

authorized * * * the consolidation of the corporation with any other corporation then existing or that might thereafter be organized. She therefore contemplated that * * * the Real Estate Title and Trust Company might be consolidated with some other corporation * * *" 264 Ill. at 35-36. Similarly, Otto Young must be deemed to have contemplated the consolidation of the First Trust and also of the First Union Trust "with any other corporation then existing or that might thereafter be organized." We think it is clear that in the language of the *Zinser* case The First National was at the time Otto Young drew his will a "corporation then existing or that might thereafter be organized." (Pp. 41-44.)